

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

BRIEF FOR APPELLANT AND JOINT APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

768

No. 16,788

MURRAY H. INGALLS,

United States Court of Appeals
For the
District of Columbia Circuit
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Joseph W. Stewart
CLERK

Appellant

v.

EUGENE M. ZUCKERT,
Secretary of the Air Force,

Appellee

Appeal from the United States District Court
for the District of Columbia

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Washington, D. C.

QUESTIONS PRESENTED

1. Was the Air Force bound to comply with administrative requirements of an officer's resignation within the provisions of AFR 35-66, effective April 14, 1959 to a resignation effective April 24, 1959?
2. Was a genuine issue as to a material fact raised by appellant's assertion that he was denied the assistance of counsel and that he did not waive the right of military counsel?
3. Was proper administrative consideration given to appellant's outstanding combat and overseas military record before resignation proceedings were taken against him?
4. Was a genuine issue as to a material fact raised by appellant's assertion that he was denied the right of a psychiatric examination and was physically disabled as an incident of his service and was denied the right of physical disability retirement?

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IN THE
UNITED STATES COURT OF APPEALS
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No. 16,788

MURRAY H. INGALLS, Appellant

v.

EUGENE M. ZUCKERT,
Secretary of the Air Force
Appellee.

Appeal from the United States District Court
for the District of Columbia

BRIEF FOR APPELLANT

Jurisdictional Statement

This is an appeal docketed December 28, 1961, under the provisions of Title 28, Section 1291 U.S. Code from an Order of the United States District Court for the District of Columbia entered November 20, 1961, granting summary judgment for defendant-appellee and denying summary judgment for plaintiff-appellant and dismissing the complaint. Notice of Appeal was filed November 22, 1961.

Statement of the Case

This is a military resignation case.

The appellant at the time of his separation from the Air Force on April 24, 1959, held a permanent appointment as Major in the Regular United States Air Force. (J.A. 2) He is a veteran of World War II with over forty (40) air combat missions in North Africa, Sicily, Salerno, Anzio, and Southern France. (J.A. 9). He participated in the Berlin Air Lift. (J.A. 9) He is the holder of the following medals: Air Medal (70 clusters), Army Occupation (Germany), World War II Victory Medal, American Defense Medal, Medical Human Action Medal, European-Africa-Middle East Campaign, American Campaign, National Defense, Berlin Air Lift (J.A. 9). He received an "outstanding rating" from Major General L. I. Davis, USAF (J.A. 9)(39) He has over eighteen years of military service.

In December, 1958, appellant, in an interview with Harris O. Poy, Office of Special Investigations, was shown several affidavits of accusations against him of a derogatory nature. Appellant denied all the accusations against him. He was not confronted personally with these witnesses. There was no corroboration of these accusations (J.A. 11).

On or about March 9, 1959, appellant received a Letter of Notification from Brigadier General Daniel H. Hooks, USAF, who stated:

"The functions of this board and your rights, including the availability of legal counsel, where desired, are fully explained in AFR 35-66." (J.A. 11, 16)

He was given 72 hours to sign his resignation. He did not have legal counsel, nor was legal counsel available to him, and military counsel was not provided him, and it was refused him, although requested. (J.A.3)

On or about March 12, 1959, appellant signed a "Tender of Resignation for the Good of the Service," without the advice of counsel, and without the opportunity of consulting counsel, and counsel was refused him. (J.A. 3) (J.A. 17, 18)

On or about March 13, 1959, appellant received a superficial and inadequate medical examination and was found "Qualified for Separation," although at that time he requested a psychiatric examination which was refused him, contrary to law, and no electrocardiogram was given him, contrary to law, and he was suffering from a Baker's cyst of the left knee and other disabilities. (J.A. 3)

On April 7, 1959, the Secretary of the Air Force accepted appellant's resignation. (J.A. 8, 23)

On April 9, 1959, appellant was notified of the acceptance of his resignation by the Secretary of the Air Force, effective April 24, 1959. (J.A. 15)

On April 24, 1959, appellant was discharged from the Air Force under other than honorable conditions. (J.A. 2, 3)

Appellant filed an appeal to the Air Force Board for the Correction of Military Records to review the resignation proceedings. (J.A. 25)

On May 5, 1960, appellant's application for review was denied by the Air Force Board for the Correction of Military Records. (J.A. 26)

Proceedings Below

On May 22, 1961, appellant filed a complaint in the United States District Court for the District of Columbia for a declaratory and mandatory injunction, ordering the Secretary of the Air Force to reinstate appellant as a major, and for back pay and in the alternative for an Honorable Discharge (J.A. 2, 3, 4, 5). The Court below, per Judge Holtzoff, in a memorandum opinion granted appellee's motion for summary judgment, stating that the validity and the effect of the resignation is governed by the regulation in effect at the time the resignation was tendered and accepted and not when the resignation became effective and; that the standard medical examination, which was to include a psychiatric consultation, did not have to be made as the resignation was tendered. (J.A. 40)

On November 20, 1961, the Court below granted appellee's Motion for Summary Judgment and denied appellant's Motion for Summary Judgment and dismissed the complaint (J.A. 27). This appeal followed. (J.A. 38)

Statutes and Regulations Involved

5 USC 8012 (f)

Air Force Regulation 35-66, 23 July 1956

AFM 160-1

Air Force Regulation 35-66, 17 March, 1959

Air Force Regulation 36-12, 22 March, 1954

Air Force Regulation 36-12A, 27 July 1954

Air Force Regulation 111-5, 26 November 1956

Air Force Manual 35-4

Rule 56(c), Federal Rules of Civil Procedure

Miscellaneous

The Inspector General, United States Air Force

TIG Brief, Number 7, Volume XI, 30 March, 1959.

POINT RAISED ON APPEAL

The motion for summary judgment should have been denied as the Air Force failed to comply with administrative requirements of its regulations and appellant raised genuine issues of material fact.

SUMMARY OF ARGUMENT

I

Appellant's resignation was procedurally defective as he was denied the right of assistance of counsel and he did not waive counsel under regulations when he tendered his resignation and also under an amendment to a later regulation when his resignation was effective he was entitled to assistance of counsel. Counsel was denied him and the Air Force failed to comply with its regulations in force and effect, as to furnishing counsel.

II

Appellant should have been granted a psychiatric consultation and examination as provided in the regulations, but this was not done.

Inasmuch as the resignation was procedurally defective it was void for lack of compliance with the regulation, appellant should have been given a psychiatric consultation and examination as provided in the regulation.

III

Appellant should have been retired for physical disability in line of duty because of the cyst formation involving the popliteal space of the left knee, called a Baker's cyst. He should have been sent to a hospital for medical evaluation, which was not done.

A R G U M E N T

- I. The Court Below Erroneously Concluded that the Validity and Effectiveness of Appellant's Resignation was Governed by AFR 35-66 (1956) which was in Effect when the Resignation was Signed and Not By AFR 35-66 (1959) which was in Effect Ten Days Prior to Effective Date of the Resignation.

The Court (Holtzoff J.) below in a memorandum opinion on November 9, 1961 stated:

"The Court is of the opinion that the validity and the effect of the resignation must be governed by the regulation that was in effect at the time that the resignation was tendered and accepted, not as of the time when it became effective, which was at a later date.

"The Court is further of the opinion that the standard medical examination, which was to include a psychiatric consultation, did not have to be made if the officer tendered his resignation in lieu of further action. (J.A. 40)

The Court apparently was referring to AFR 35-66, 23 July, 1956.

The pertinent part, at page 13, reads:

"5. Legal counsel has been made available to me. I did not avail myself of legal counsel. (I did avail myself of legal counsel (name of counsel) on dates or dates)." (J.A. 6,7)

Appellant stated in his Tender of Resignation:

"6. I have been afforded the opportunity of consulting legal counsel regarding the advisability of submitting this resignation." (J.A. 18)

AFR 35-66 (1959) was promulgated on March 17, 1959 and was

effective on April 24, 1959. It was in full force and effect for ten days prior to appellant's discharge on April 24, 1959. His resignation was tendered on March 7, 1959. Furthermore, the Air Force, by the doctrine of lis pendens, had notice on March 17 and prior, as the regulation was prepared by the Air Force. Therefore, the Air Force was bound to comply with AFR 35-66, (1959). The pertinent part of this regulation is at page 18, The Letter of Notification, which reads:

"4. Military counsel has been obtained to assist you (give name and rank). In lieu of appointed counsel you may have counsel of your choice, provided such counsel is serving in the active military service and is reasonably available. Also, in lieu of military counsel you have the right to employ civilian counsel, but if civilian counsel is employed it must be at your own expense as no funds are available for payment to civilian counsel under this authority. In the event you waive your right to military counsel, you are required to furnish a written statement to this effect, to be attached to the file in your case.

"5. Request that you confer with counsel concerning your case and advise me, without delay, of your intentions regarding paragraph 3 above. If you elect to submit your resignation, furnish your tender of resignation to me. If you do not elect to submit your resignation, furnish me with a written statement to that effect." (J.A. 24)

This regulation was in full force and effect when appellant was on active duty and was retroactive to the date of submission of his resignation on March 12, 1959. AFR 36-12, 12A(1954) governs resignations.

Under the provisions of 5 USC 8012 (f), "The Secretary (of the Air Force) may prescribe regulations to carry out his functions, power, and duties under this title." Under this authority Air Force regulations are promulgated.

Army regulations issued in accordance with the statutes have the

force of law. Hironimus v. Durant, 168 F 2d 288. Spencer v. U. S. 121 Ct. Cl. 558, 102F Supp, 744, certiorari denied, 73 S.Ct. 29.

A valid administrative regulation binds the administrator himself equally with others, just as if provisions were prescribed in terms by statute. School Dist. 2 Fractional, Athens Tp., Calhoun County, Mich. v. U. S. 229 F 2d. 681. U. S. v. Finn, 127 F. Supp, 158, modified 239 F 2d. 679.

The Secretary of the Interior is bound by his own regulation so long as it remains in effect since it has the force of law. McKay v. Wahlenmaier, 226 F 2d. 35, 96 US App. D.C. 313.

Mr. Justice Harlan in Service v. Dulles, 354 U.S. 363, 1 L Ed. 2d, 1403 77 S.Ct. 1152 states:

"That regulations validly prescribed by a government administrator are binding upon him as well as the citizen, and that this principle holds even where the administrative action under review is discretionary in nature." ibid. 354, U.S. 363, 372.

See also Watson v. United States, 162 F. Supp. 755, 142 Ct. Cl. 749, Clackum v. United States, 296 F 2d. 226, Ct. Cl. No. 246-56.

Under the circumstances the resignation of appellant is null and void. In issuing the discharge, the Secretary acted in excess of his powers. Harmon v. Brucker, 355 U.S. 579, 78 S.Ct. 433; Davis v. Brucker, 107 U.S. App. D.C. 152, 275 F 2d. 181. Service v. Dulles, supra.

Appellant did not make a knowing or intelligent waiver of counsel. See Daniel v. United States. U.S. App. D.C. No. 15352.

When the Air Force amended AFR 35-66 (1956) by AFR 35-66 (1959) which was effective ten days prior to the effective date of appellant's

discharge, this amendment was retroactive.

Judge Medina stated in N.L.R.B. v. National Container Corp.

211 F 2d. 525, 534:

"It is well settled that where, as here, an administrative agency in pursuance of its adjudicatory function makes an ad hoc change in one of its administrative policies, such change may be applied retroactively in an appropriate case. Securities and Exchange Commission v. Chenery Corp. 332 U.S. 194, 67 S Ct. 1575, 1760, 91 Ed. 1995. The test is whether the practical operation of the Board's change of policy ...(will) work hardship upon respondent altogether out of proportion to the public ends to be accomplished."

An administrative agency may relax or modify its procedural rules, and its action in so doing will not be subjected to judicial interference, in absence of a showing of injury or substantial prejudice. Sun Oil Company, v. Federal Power Commission, 256 F 2d 233, certiorari denied 79 S.Ct. 111, 358 U.S. 872, 32 Ed 2d 103.

The appellant at the time of his discharge from the Air Force on April 24, 1959, held a permanent appointment as major in the United States Air Force. He was a veteran of World War II with over (40) air combat missions in North Africa, Sicily, Salerno, Anzio, and Southern France. He participated in the Berlin Air Lift. He is the holder of the following medals: Air Medal (70 Clusters), Army Occupation (Germany), World War II Victory Medal, American Defense Medal, Medical Human Action Medal, European-Africa Middle East Campaign, American Campaign, Berlin Air Lift Medal. He received an "outstanding rating" from his superior, Major General L. I. Davis, U.S.A.F., who also concurred in the "outstanding rating" on Major Ingalls during the period November 24, 1956 to May 31, 1957.

For the period June 1, 1957 to May 31, 1958, Major General L. I. Davis, U.S.A.F., concurred in the rating given him by Lt. Col. Donald H. Vlcek, which was, "one of the very few outstanding officers that I know." (J.A. 39)

TIG Brief, Number 7; Volume XI, 30 March 1959, states on page 5:

"SERVICE RECORD, AIRMAN'S RIGHTS, HIGHLIGHT DISCHARGE POLICY CHANGES.

"A uniform 'code' to apply to discharges from the Armed Forces is reflected in the publication of fourteen revised AFRs listed on page 8 (7), which become effective on April 14, 1959. An individual's military record is to weigh heavily in deciding what type of discharge he gets even though an undesirable discharge is being considered. After April 14, in such a case, a general or even honorable discharge can be awarded where before, in most instances, the undesirable separation is mandatory."

The policy regarding disciplinary action and disposition of cases of personnel with outstanding combat and overseas records is promulgated in AFR 111-5, of 26 November, 1956. The policy is:

"Commander is urged to give appropriate consideration to that military record before determining what disciplinary action to take."

His excellent personal and military character is testified to in the affidavits of Richard F. Chandler, Ursel C. Nolte, Grace Nolte, Warren M. Sanders, Bascom E. Tillotson and Lela Tillotson. (J.A. 28, 29, 30, 31, 32, 33)

Appellant's service record is so excellent that in itself it furnished extenuating circumstances sufficient to grant reinstatement or an Honorable Discharge or a General Discharge. Appellant has suffered serious injuries and substantial injustice by his discharge, Sun Oil Company v. Federal Power Commission, supra.

Rudyard Kipling in his famous poem of the British soldier,

"Tommy," says:

"Yes, makin' mock o' uniforms that guard you while you sleep
Is cheaper than them uniforms, an' they're starvation cheap;
An' hustlin' drunken soldiers when they're goin' large a bit
Is five times better business than paradin' in full kit.
Then it's Tommy this, an' Tommy that, an' "Tommy, 'ow's yer
soul?"

But it's "Thin red line of 'eroes" when the drums begin to
roll -

The drums begin to roll, my boys, the drums begin to roll,
O it's "Thin red line of 'eroes" when the drums begin to roll.

.

"You talk o' better food for us, an' schools, an' fires, an' all:
We'll wait for extry rations if you treat us rational.
Don't mess about the cook-room slops, but prove it to our face
The Widow's Uniform is not the soldier-man's disgrace.

For it's Tommy this, an' Tommy that, an' "Chuck him out,
the brute!"

But it's "Savior of 'is country" when the guns begin to
shoot;

An' it's Tommy this, an' Tommy that, an' anything you please;
An' Tommy ain't a bloomin' fool - you bet that Tommy sees!"

II. Summary Judgment Will Not Lie Where Appellant Was Denied The
Right Of Counsel And Counsel Was Not Waived Under the Require-
ments of AFR 35-66 (1956)

Military counsel was not available to appellant nor did military
counsel assist him.

Appellant states in his affidavit of October 27, 1961, as follows:

"That on March 9, 1959 I received a Letter of Notification
from Brig. Gen. Daniel H. Hooks, USAF; that I was given 72
hours to sign resignation; that legal military counsel was
not provided me; that civilian counsel was not available to
me; that I was refused counsel; that on March 12, 1959 I
signed a Tender of Resignation for the Good of the Service,
without advice of counsel and without the opportunity of con-
sulting counsel and counsel was refused me" (J.A. 11)

Major Ursel C. Nolte, USAF, in his affidavit stated as follows:

*But it's Tommy this, & Tommy that x
Tommy's away, & Tommy's away, who
But it's "Thin red line of 'eroes" when the drums begin to roll.
The drums begin to roll, my boys, the drums begin to roll.*

"On October 28, 1959, at Holloman AFB, I was in the Office of Special Investigations in the presence of Mr. Murray Ingalls and OSI Agent, Mr. Poy. Mr. Ingalls queried Mr. Poy concerning legal counsel not being afforded Mr. Ingalls with direct reference to allegations resulting USAF discharge of Mr. Ingalls.

"Mr. Poy agreed that such service was not afforded to the best of his knowledge."

Issues of fact are raised by these affidavits as to whether there was compliance with AFR 35-66, of 23 July 1956. Legal counsel was not made available to the appellant as required by this regulation.

In Paroczay v. Hodges, U.S. App. D.C., #16251, decided December 28, 1961, Judge Fahy stated:

"... we conclude that the papers before the Court created a genuine issue of material fact as to the voluntariness of the resignation and that this precluded summary judgment. Tule 56(c), Fed. R. Civ. P. Sartor v. Arkansas National Gas Corp., 321 US 620; Evers v. Buxbaum, 102 U.S. App. D.C. 334, 335, 253 F2d. 356, 357."

Apparently the appellee contends that AFR 35-66, 23 July 1956 governs the policies and procedures of the processing of appellant's resignation. Even under that regulation, appellant's resignation is defective as he did not have assistance of counsel, although he stated that he did in his Tender of Resignation. He controverts this in his affidavit and so does Major Ursel Nolte, USAF.

Summary judgment should not be granted when there is a bona fide dispute of facts on genuine issues. Cautiously and carefully should the summary judgment rule be invoked. Sartor v. Arkansas Gas Corp., supra at 627-28; Evers v. Buxbaum, supra; Dewey v. Clark, 86 U.S. App. D.C. 137, 180 F2d. 776; Colby v. Klune, 178 F 2d. 872 2d. Cir. 1949.

III. As The Resignation Is In Some Manner Invalid, Appellant As A Matter Of Law Continues On Active Duty.

Appellant contends that his discharge is invalid and his right of assistance of counsel was denied him. Under the doctrine of Egan v. U. S., 156 F. Supp. 377 (1958), 10 USCA Sec. 1562, the Court held that inasmuch as Egan's discharge was invalid as a matter of law, he continued on active duty.

An unwarranted dismissal from the naval service of an officer by the Secretary of the Navy is ineffective. U. S. v. Perkins, 6 S.Ct. 449, 116 U.S. 483, 29 L.Ed. 700 affirming 20 C.Cls. 438, the Court said:

"The head of the Department has no constitutional prerogative of appointment to offices independently of the legislation of Congress, and by such legislation he must be governed not only in making appointments but in all that is incident thereto." p. 483.

Appellant's discharge is illegal and he should be restored to active duty or be honorably discharged.

IV. Appellant Should Have Been Granted A Psychiatric Consultation And Examination In Accordance with AFR 35-66. Sec. B. Par. 14 (a) (11). (1956) (1959).

Appellant was given a hurried, superficial and inadequate physical examination on March 13, 1959, which was inadequate in the following respects:

a. No psychiatric examination was given on March 13, 1959, although appellant requested it.

b. The medical report reveals a "5 cm. diameter fluctuant cyst, post aspect left knee (Baker's cyst)." This cyst should have been removed by surgery before discharge. Appellant requested an operation

on March 13, 1959, but this was denied him.

Other defects found in the Separation Physical Examination are:

- a. Catch in elbow for past six years.
- b. Fainting and dizziness from 1953 to present.
- c. Soaking night sweats.
- d. Loss of memory as result of over-indulgence in alcohol.

AFR 35-66, dated 23 July, 1956, and AFR 35-66, dated 17 March, 1959, Section B. Paragraph 14 (a) (11) reads:

"Standard Medical Examination recorded on Standard Form 88, 'Report of Medical Examination,' to include psychiatric consultation, ... if feasible."

In the AFR 35-66, dated March, 1959, reads after consultation, "in accordance with AFM 160-1." Otherwise, both regulations read the same.

According to Webster's Third New International Dictionary, 1961, G & C Merriam Co., Springfield, Mass., feasible means:

1. "Capable of being done, executed or effected - possible of realization ...;
2. Capable of being managed, utilized, or dealt with successfully ... syn. see possible."

Clearly, it was feasible for the Air Force to have given appellant a psychiatric consultation. Surely Holloman Air Force Base has adequate hospital facilities and an adequate medical staff for all types of treatment. Assuming facilities were not available at Holloman, appellant could have been air transported to another medical facility for compliance with the regulation. Or the Air Force could have brought in a psychiatrist from another facility. Appellant signed his resignation on March 12, and was not discharged until April 24. The Air

Force had adequate time to have had appellant examined.

The Kinsey Report (Sexual Behavior in the Human Male, Kinsey, Pomeroy & Martin, W. B. Saunders, Philadelphia, 1948) at p.665 states:

"The difficulty of the situation becomes still more apparent when it is realized that these generalizations concerning the incident and frequency of homosexual activity apply in varying degrees to every social level, to persons in every occupation, and of every age in the community."

Frank S. Caprio, M. D., one of the leading psychiatrists in the District of Columbia and the United States, states:

"Based on the information that I could ascertain he (Ingalls) was never given an opportunity to receive a thorough psychiatric examination while in the military service and he feels had he had this opportunity he could have explained how he had become victimized by an unfortunate set of circumstances. He had also suffered from a knee injury and feels that he did not receive the benefit of adequate treatment."

Scientific equanimity and cool attention to the facts in this type of case, clearly shows the necessity of a psychiatric examination to determine the facts as well as comply with the regulation, which is limited only by the definition of the word, "feasible."

Fair standards of justice also demand that appellant should have been given a psychiatric consultation.

V. Appellant Should Have Been Retired For Physical Disability In Line Of Duty As An Incident Of The Service On April 24, 1959, In The Rank Of Major.

Based on the physical defects noted in the Separation Examination of March 13, 1959, supported further by the physical finding of Matthew White Perry, M.D., of Washington, D. C., and associates, in his report attached of September 19, 1959, Appellant should have been sent to a hospital under the processing provision of AFM 35-4.

Dr. Perry found that appellant has the following considerations:

"1. A cyst formation involving the popliteal space of the left knee, so-called Baker's cyst.

"2. A general reddening of the mucous membrane of the recto-sigmoid without definite ulceration."

Milton C. Cobey, M. D., of Washington, D. C., consultant to the Department of Defense, Fellow of the American College of Surgeons, Professor of Orthopedic Surgery at Georgetown University Medical School senior attending orthopedic surgeon at Children's Hospital, D. C. General and Washington Hospital Center, examined appellant on August 12, 1959, and reported as follows:

"Mr. Murray H. Ingalls came to see me today, August 12, 1959, because of a painful Baker's Cyst in the popliteal space of the left knee that has been present for two and one-half years. The patient stated that this was present approximately six months before discharge from the Army. He was seen by Dr. Louis Breck of El Paso, Texas, who is consultant for the Air Forces at the base where he was stationed. Dr. Breck stated that this was a Baker's Cyst. Why this cyst was not removed, since this is a ganglion of the capsule of the knee joint, to give this patient a normal knee, I do not know. It certainly should be removed because this patient is going to have pain in the back of the knee and pain in the calf of the leg and some pain running up the back of the thigh until this is done, and certainly will be disabled as a result of this cyst, which is a large cyst now measuring about 3 cm. in diameter, and definitely interfering with flexation of the leg and full extension of the leg because of its size."

Under the facts of the case, appellant should have been sent to the hospital for surgery of the knee, medical evaluation and retirement for physical disability in line of duty.

AFM 35-4, 14 states:

"When a commander has reason to believe that any member of his command has become unfit to perform the duties of his

grade because of physical or mental condition, he will cause the member to be examined at a local medical facility to determine his present medical condition and the need for hospitalization."

Appellant was not hospitalized. Also he should have been retired under authority of AFM 35-4, 3, which states:

"Upon a determination by the Secretary of the Air Force that a member of the Regular Air Force entitled to basic pay ... is unfit to perform the duties of his grade because of physical disability incurred while entitled to basic pay, the Secretary may retire the member with retired pay."

The action of the Secretary of the Air Force was arbitrary and capricious in not sending appellant to the hospital for evaluation and in not retiring him for physical disability in line of duty.

CONCLUSION

The language of AFR 35-66 (1959) on the requirements of counsel and the statement in writing if counsel is waived, and also appellant's excellent combat and military record in World War II, support appellant's position that the Air Force did not comply with the requirements of its own regulations. Issues of fact were properly raised below as to denial of the right of counsel and that military counsel was not waived. Appellant was denied a psychiatric examination and was not hospitalized or retired as provided under AFR 35-66 (1956) (1959) and AFM 35-4.

The decision below should be reversed and a mandate issued to the District Court directing entry of an order restoring appellant to duty in the position from which he was unlawfully removed; or he should be

given an Honorable Discharge with back pay; or retired for physical disability in line of duty.

Respectfully submitted,

Donald H. Dalton
1028 Connecticut Avenue, N. W.
Washington, D. C.
Attorney for Appellant

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16,788

MURRAY H. INGALLS, Appellant

v.

EUGENE M. ZUCKERT,
Secretary of the Air Force
Appellee.

JOINT APPENDIX

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The Pertinent Docket Entries are:

May 22 Summons, copies (3) and copies (3) of Complaint issued.

Sep 14 Motion of deft. for summary judgment; c/m 9-14-61; statement; P & A; exhibits 1, 2A, 2B, 2C, 3, 4, 5; M.C. 9-14-61. Appearance David C. Acheson, Edward P. Troxell, Joseph M. Hannon and C. Thomas McCally.

Oct 31 Opposition of pltf to deft's motion for summary judgment; motion of pltf for summary judgment; c/ acknowl. 10-31-61; statement of genuine issues; affidavit; P & A; affidavit.

Nov 8 Supplemental P & A of pltf; c/m 11-8-61.

Nov 9 Affidavit of Donald H. Vleck.

Nov 20 Order granting deft's motion for summary judgment, denying pltf's cross-motion for summary judgment and dismissing complaint. (N) Holtzoff, J.

Nov 22 Notice of appeal by pltf on order of 11-20-61; deposit by Dalton \$5.00.

Dec 6 Transcript of proceedings of 11-9-61; Vol I, pp 1-3; Reporter, Gerald Nevitt.

Dec 28 Record on Appeal delivered to USCA; deposit .95¢ by Donald Dalton

Filed May 22, 1961

COMPLAINT FOR DECLARATORY INJUNCTION AND
MANDATORY INJUNCTION ORDERING THE SECRETARY
OF THE AIR FORCE TO REINSTATE PLAINTIFF IN
HIS POSITION AS MAJOR, U.S. AIR FORCE AND
FOR BACK PAY, OR IN THE ALTERNATIVE, FOR AN
HONORABLE DISCHARGE

1. This is an action in equity wherein the matter in controversy exceeds the value of Ten Thousand Dollars (\$10,000.00), exclusive of interest and costs, and arises in the District of Columbia under the laws of the United States.

2. The plaintiff, Murray H. Ingalls, is a citizen of the United States and a resident of the State of California, residing at 1825 West Leewood Street, West Covina, California; he entered the then Army Air Corps as an air cadet at Luke Air Force Base, Arizona on December 18, 1941; after entering the army as an enlisted man on January 13, 1941, he was appointed a second lieutenant and qualified as a pilot on June 23, 1942 and was advanced in grade to Major, U. S. Air Force on January 1, 1957. Since November 3, 1947 he has served on continuous active duty until April 24, 1959, when he received a Discharge Under Other Than Honorable Conditions From the Armed Forces of the United States of America.

3. The plaintiff, at the time of his separation, held a permanent appointment as Major in the United States Air Force, and is an honorably discharged veteran of World War II, who qualifies for the protection of Section 14 of the Veterans' Preference Act of 1944, as amended (Title 5 Section 851 et seq. 863, United States Code).

4. The defendant, Eugene M. Zuckert, is Secretary of the Air Force of the United States of America and was plaintiff's highest superior officer.

5. On or about March 9, 1959, plaintiff received a Letter of Notification from Brigadier General Daniel E. Hooks, USAF, who said: "I am in receipt of information to substantiate discharge action under Air Force Regulation 35-66." Further on the letter said in paragraph 3c: "The functions of this board and your rights, including the availability of legal counsel, where desired, are fully explained in AFR 35-66." He was given 72 hours to sign his resignation. He did not have legal counsel, nor was legal counsel available to him, and military counsel was not provided him, and it was refused him, although requested.

6. On or about March 12, 1959, plaintiff signed a "Tender of Resignation for the Good of the Service," without the advice of counsel and without the opportunity of consulting counsel, and counsel was refused him.

7. On or about March 13, 1959, plaintiff received a superficial and inadequate medical examination and was found "Qualified for Separation," although at that time he requested a psychiatric examination which was refused him, contrary to law, and no electro cardiogram was given him, contrary to law, and he was suffering from a Baker's cyst of the left knee and other disabilities.

8. On or about April 24, 1959, plaintiff was discharged Under Other Than Honorable Conditions.

9. After his discharge plaintiff appealed to the Air Force Board for Correction of Military Records and requested an oral hearing in application for correction of his military record. This appeal was denied on May 5, 1960, without a hearing.

10. The action of the defendant in ordering the plaintiff discharged from the United States Air Force with a Discharge Under Other Than Honorable Conditions was beyond statutory authority of the defendant, and was not authorized by any of the applicable rules and regulations of the United States Air Force.

11. The plaintiff seeks a declaratory and mandatory injunction under the provisions of 5 U.S.C. Section 851 et seq. 863 (The Veterans' Preference Act, as amended); 5 U.S.C. Sections 1001 - 1009 (The Administrative Procedure Act); 22 U.S.C. Sections 2201 - 2202 (The Declaratory Judgments Act); and other federal laws and regulations.

12. The action of the defendant in ordering the plaintiff discharged from the United States Air Force with a Discharge Under Other Than Honorable Conditions, was arbitrary and capricious and in violation of the due process clause of the Fifth Amendment to the United States Constitution.

13. By reason of the said discharge, plaintiff has been and will be deprived of substantial monetary benefits and rights as a regular officer of the Air Force and as a veteran under both Federal and State legislation. And that he will continue to encounter substantial prejudice in civilian life where the type of discharge rendered in the Armed Services of the United States, or the character of the discharge

received therefrom, has any bearing.

14. The character and efficiency of plaintiff's service in the United States Air Force was such as would entitle plaintiff to be continued on active duty, or retired for physical disability in line of duty, or an unqualified resignation, or an honorable discharge.

15. Plaintiff has no adequate remedy at law.

WHEREFORE, plaintiff prays that this Honorable Court will:

1. Take Jurisdiction of this cause.

2. Issue a declaratory judgment, declaring that plaintiff's discharge is void, unlawful and of no effect, and that plaintiff was never legally separated from his position in the United States Air Force.

3. Issue a mandatory injunction, ordering and directing the said defendant to restore plaintiff to his proper position in the United States Air Force as of the date of his illegal and unlawful discharge, together with all rights, benefits, privileges that would or might accrue from a continuity of service from the date of such illegal or unlawful discharge to the date of judgment.

4. And for such other or further relief that may to the Court seem meet and proper.

s/
Murray H. Ingalls

Filed September 14, 1961

MOTION FOR SUMMARY JUDGMENT

Comes now the defendant by his attorney, the United States Attorney for the District of Columbia, and respectfully moves the Court for summary judgment on the ground that there exists no genuine issue of material fact and defendant is entitled to judgment as a matter of law.

Attached hereto and made a part of this motion are certified copies of documents extracted from the personnel file of plaintiff, identified as Government's Exhibit No. 1; a certified copy of Air Force Regulation 35-66, dated July 23, 1956, Air Force Regulation 36-12, dated March 22, 1954, Air Force Regulation 36-12A, dated July 27, 1954, identified as Government's Exhibit Nos. 2(a), 2(b) and 2(c) respectively; a certified copy of Air Force records and material contained in plaintiff's file in Docket No. 59-1267 in the office of the Air Force Board for the Correction of Military Records, identified as Government's Exhibit No. 3; a certified copy of Air Force Regulation 35-66, dated March 17, 1959, identified as Government's Exhibit No. 4; and a certified copy of page 36, paragraph 44 of AFM 160-1, dated 30 April, 1953, identified as Government's Exhibit No. 5.

/s/

David C. Acheson
United States Attorney

Filed September 14, 1961

STATEMENT OF MATERIAL FACTS
AS TO WHICH THERE IS NO GENUINE ISSUE
PURSUANT TO LOCAL CIVIL RULE 9(h)

Defendant contends that there is no genuine issue as to the following material facts:

1. Prior to April 24, 1959 plaintiff served on active duty as a Major in the United States Air Force.
2. On March 9, 1959 plaintiff was notified by letter from the Air Force that discharge action under Air Force Regulation 35-66, dated July 23, 1956, was pending against him based on information that plaintiff was a Class II homosexual.
3. On March 12, 1959 plaintiff voluntarily signed a "tender of resignation for the good of the service" under the provisions of paragraph 7a, Air Force Regulation 36-12, dated March 22, 1954. Plaintiff's resignation states, in pertinent part, as follows:

"1. I, Murray H. Ingalls, Major, USAF, 11599A, under the provisions of paragraph 7a, AFR 36-12, 22 March 1954, hereby voluntarily tender my resignation from all appointments held by me at this time. I fully understand that if this resignation is accepted I may be discharged under other than honorable conditions from all appointments held by me.

"2. The reason for the submission of this resignation is: I am being considered for elimination from the service under AFR 35-66 (Class II). I am tendering my resignation for the good of the service in lieu of further elimination action under that regulation in accordance with paragraph 7a, AFR 36-12.

"6. I have been afforded the opportunity of consulting legal counsel regarding the advisability of submitting this resignation."

4. On March 13, 1959 plaintiff received a medical examination and was found "qualified for separation."

5. On April 7, 1959 the Secretary of the Air Force accepted plaintiff's resignation for the good of the service.

6. On April 9, 1959 plaintiff was notified of the acceptance of his resignation by the Secretary effective April 24, 1959.

7. On April 24, 1959 plaintiff was separated from the Air Force under other than honorable conditions.

8. Plaintiff appealed to the Air Force Board for the Correction of Military Records for review of the type of discharge received.

9. On May 5, 1960 the Air Force Board for the Correction of Military Records denied plaintiff's application for review.

10. This action was filed on May 22, 1961.

/s/

David D. Acheson
United States Attorney

Filed October 31, 1961

OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT
AND PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Comes now the plaintiff by counsel and opposes defendant's motion for summary judgment and moves the Court for summary judgment on behalf of plaintiff on the grounds that the defendant has not presented a genuine issue of material fact and plaintiff is entitled to judgment as a matter of law.

/s/

Donald H. Dalton

Filed October 31, 1961

STATEMENT OF GENUINE ISSUES PURSUANT
TO LOCAL CIVIL RULE 9(h)

Plaintiff contends that there are genuine issues as to the following material facts:

1. Plaintiff was entitled to an Honorable Discharge under a claim of unusual extenuating circumstances of:
 - a. That he is a veteran of World War II with over forty (40) air combat missions in North Africa, Sicily, Salerno, Anzio, and Southern France.
 - b. That he participated in the Berlin Air Lift.
 - c. That he is the holder of the following medals: Air Medal (70 clusters), Army Occupation (Germany), World War II Victory Medal, American Defense Medal, Medical Human Action Medal, European-Africa-Middle East Campaign, American Campaign, National Defense, Berlin Air Lift.
 - d. That he received an "outstanding rating" from Major General L. I. Davis, USAF.
 - e. That his USAF OFFICER EFFECTIVENESS REPORTS have been many times Exceptional, Successful and Outstanding.
2. That plaintiff received a superficial and inadequate medical examination on March 13, 1959.
3. That plaintiff should have been retired for physical disability in line of duty, as an incident of the service, on April 24, 1959, with the rank of Major.

4. That the Air Force denied plaintiff the right of counsel.
5. That plaintiff was without legal counsel when he signed a Tender of Resignation.
6. That the Air Force did not make legal counsel available to plaintiff when he signed a Tender of Resignation.
7. That plaintiff signed a Tender of Resignation without advice of counsel, nor an opportunity of consulting legal counsel.
8. That the action of the Air Force Board for Correction of Military Records was arbitrary and capricious in not granting plaintiff an Honorable Discharge or retirement for physical disability in line of duty.
9. That the Action of Defendant, Secretary of the Air Force, was arbitrary and capricious, and unlawful in not granting plaintiff an Honorable Discharge or retirement for physical disability in line of duty.
10. That the delay in filing the case in court was a reasonable delay, caused by financial hardships and adjustment to civilian life.

/s/

Donald H. Dalton
Attorney for Plaintiff

Filed October 31, 1961

AFFIDAVIT

CITY OF WEST COVINA, : ss
STATE OF CALIFORNIA.

I, Murray Ingalls, being first duly sworn, on oath, depose and say: That I am the plaintiff herein; that in December, 1958 I had an interview at Holloman Air Force Base, Alamogordo, New Mexico, with Harris O. Poy, Office of Special Investigations, U. S. Air Force; that Mr. Poy showed me several affidavits of accusations against me; that I denied all these accusations; that I was not confronted personally with the signers of the affidavits; that there was no corroboration of these affidavits; that on March 9, 1959, I received a Letter of Notification from Brigadier General Daniel H. Hooks, USAF; that I was given 72 hours to sign my resignation; that legal military counsel was not provided me; that civilian counsel was not available to me; that I was refused counsel; that on March 12, 1959, I signed a Tender of Resignation for the Good of the Service, without the advice of counsel and without the opportunity of consulting counsel and counsel was refused me; that on March 13, 1959, I received a superficial and inadequate medical examination; that I requested a psychiatric examination, which was refused me; that no electrocardiogram was given me; that I was suffering from a Baker's cyst in the left knee and other disabilities; that I requested an operation on said cyst but it was refused me.

That on March 10 and 11, 1959, I requested legal advice of Major Gasiewicz, USAF, the Judge Advocate General at Holloman Air Force Base,

Alamogordo, New Mexico, and legal advice was refused me; that during the period, March 10 to 11, 1959, I requested of Major Gasiewicz to take my file to the Judge Advocate General at Walker Air Base, New Mexico, but Major Gasiewicz refused me the right to take my file with me and would not let the said file off the Base; that the above said Harris O. Poy knows that I did not have the opportunity of consulting counsel and admitted it in the presence of witnesses; that Lieutenant Colonel James R. Gilmore, USAF, Deputy Chief of Staff, Holloman Air Force Base, on March 12, 1959, knew that I had no opportunity of consulting counsel and admitted that information to me; that I was not sent to a hospital or before a medical board for evaluation of my disabilities;

That delay in filing my case in Court was because I was financially unable to retain counsel and afford court costs and legal expenses, as I am the sole support of my wife and two minor children; that I was separated from the United States Air Force with a Discharge Under Other Than Honorable Conditions in the rank of Major on April 24, 1959.

That I am a veteran of 40 Combat Missions, 199 hours in World War II, having served in North Africa, Sicily, Salerno, Anzio, Southern France, and also in the Berlin Air Lift; that I am the recipient of the following awards:

Air Medal (70 clusters)

Army Occupation (Germany)

World War II Victory Medal

American Defense Medal

Medical Human Action

European, Africa, Middle East Campaign

American Campaign

National Defense Medal

Berlin Air Lift

AFISA Ribbons

Subscribed and sworn to before me,
a Notary Public, on this 27th day
of October, 1961.

/s/
Murray Ingalls

Filed October 31, 1961

AFFIDAVIT

CITY OF WEST COVINA: ss
STATE OF CALIFORNIA

I, Murray Ingalls, being first duly sworn, on oath, depose and
say: That I am the plaintiff herein; that the delay in filing my case
in court was because I was financially unable to until May of 1961 for
the following:

- a. My wife, two children and I left Alamogordo, New Mexico, for
Tilton, New Hampshire, to live with her folks.
- b. I was unable to find work in the Tilton area.
- c. We could not sell or rent our house in New Mexico but still
had to pay \$125.00 a month for it.
- d. In October of 1959, I came to Los Angeles, California to
find work, which I did the end of November.

e. I moved my family to California in July of 1960.

f. I still paid for the house in New Mexico \$125.00 a month until I sold it in the spring of 1961, and paid from July 1960 \$120.00 a month for a place in California for my family at the same time.

g. I had to pay to have our household goods moved from New Mexico to California.

h. I had to pay all the transportation costs of my family.

i. That I was out of work for seven months.

That to finance all of the extra costs that were imposed on me, I had to borrow \$2,500.00 from our life insurance policies, \$1,600.00 from my wife's family, cash my son's \$1,000.00 bond and sell \$3,300.00 of my stock securities.

That to date we have been unable to return any of this money. That when my house in Alamogordo, New Mexico, was sold for \$16,500.00, for which I had paid \$20,500.00, I only received \$2,000.00 cash. That I lost \$4,000.00 on this transaction as I could no longer pay for two places.

That upon receipt of the \$2,000.00 I sent the money required to Mr. Donald H. Dalton, my attorney. That this money was for him to file my case in court.

/s/
Murray H. Ingalls

DEPARTMENT OF THE AIR FORCE
WASHINGTON

SPECIAL ORDERS)
NUMBER C-216)

9 April 1959

1. MAJ MURRAY H INGALLS, 11599A (Maj, RegAF) is relieved from assignment Hq AFMDC, ARDC, Holloman AFB, N Mex effective 24 Apr 59, on which date his resignation is accepted by the President under provision of paragraph 7a(3), AFR 36-12, and he is discharged under other than honorable conditions from all appointments in the USAF. Officer will be issued DD Form 794AF. Transportation officer will furnish transportation in kind to home of record Tilton, NH, or in lieu thereof if requested by officer and approved by unit commander, to another place provided cost does not exceed cost of transportation to home of record. SDN 52A. PCS. TDN. 5793500 948-141 P 531.11 S 503725 02.

BY ORDER OF THE SECRETARY OF THE AIR FORCE:

THOMAS D. WHITE
Chief of Staff

HEADQUARTERS
Air Force Missile Development Center
Air Research & Development Command
Holloman Air Force Base, New Mexico

9 March 1959

SUBJECT: Letter of Notification

To: Major Murray H. Ingalls, 11599A
Air Force Missile Development Center
Holloman Air Force Base, New Mexico

1. This is to officially notify you that I am in receipt of

information to substantiate discharge action against you under Air Force Regulation 35-66.

2. Based upon this information and the policy outlined in Air Force Regulation 35-66, there is reason to believe that you are a class II homosexual. For your information a copy of this regulation is attached; it explains the policy on this subject in detail and defines your rights as a respondent in the proposed action.

3. The following actions will now be initiated:

a. As a class II respondent, your case will be referred to the appropriate authority for consideration of trial by general court-martial.

b. As a class II respondent you may request discharge under other than honorable conditions in lieu of further action under Air Force Regulation 35-66 utilizing the attached format which is self-explanatory.

c. As a class II respondent, you may request that your case be considered by a board of officers as prescribed in section C of AFR 35-66. The functions of this board and your rights, including the availability of legal counsel, where desired, are fully explained in AFR 35-66.

2 incls

1. AFR 35-66
2. Attachment 2 to AFR 36-12

/t/ DANIEL E. HOOKS
Brigadier General, USAF
Commander

Headquarters
AIR FORCE MISSILE DEVELOPMENT CENTER
Air Research and Development Command
United States Air Force
Holloman Air Force Base,
New Mexico

12 March 1959

SUBJECT: Tender of Resignation for the Good of the Service

TO: Director of Military Personnel
Headquarters, USAF
Washington 25, D. C.

1. I, Murray H. Ingalls, Major, USAF, 11599A, under the provisions of paragraph 7a, AFR 36-12, 22 March 1954, hereby voluntarily tender my resignation from all appointments held by me at this time. I fully understand that if this resignation is accepted I may be discharged under other than honorable conditions from all appointments held by me.

2. The reason for the submission of this resignation is: I am being considered for elimination from the service under AFR 35-66 (class II). I am tendering my resignation for the good of the service in lieu of further elimination action under that regulation in accordance with paragraph 7a, AFR 36-12.

3. I understand that I will not be entitled to mustering-out pay or settlement for accrued leave.

4. I understand that if I am discharged under other than honorable conditions as a result of acceptance of this resignation I may be deprived of many rights and benefits under laws administered by the Veterans Administration.

5. I am not accountable or responsible for public property or funds.

6. I have been afforded the opportunity of consulting legal counsel regarding the advisability of submitting this resignation.

7. Even though paragraph one of this letter would indicate that I am admitting the allegations I would like to point out that I have not and do not admit to or deny this allegation inasmuch as after over-imbibing in alcohol I have for the past several years experienced black outs. During these periods I do not recall anything that takes place.

8. I am requesting that under paragraph 4b, AFR 35-66 that I be considered for a General rather than an Undesirable discharge. I feel that my service performance over the past fourteen (14) years speaks for itself as to the amount and quality of my work and proves my feeling of dedication to the Air Force. I feel that as such it warrants a General rather than an Undesirable discharge because the latter would jeopardize the lives of my wife and my children as well as my own for as long as we live. I would be unable to obtain employment with any company for which I am qualified to work. At present, I have several offers from prominent companies which, I am certain, would not accept me with an Undesirable discharge.

9. I prefer resignation rather than board action or court-martial because in either case these actions would bring more discredit upon the Air Force, and myself, because of the publicity they would create.

10. I respectfully request that the character of my duty performance be substantiated by an indorsement from this Center.

/s/
MURRAY H. INGALLS, 11599A
Major, USAF

Ltr fr Maj Murray H. Ingalls, 11599A, Subj: Tender of Resignation
for the Good of the Service.

MDP

1st Ind

HQ AIR FORCE MISSILE DEVELOPMENT CENTER, Holloman Air Force Base,
New Mexico 16 Mar 1959

TO: Commander, Air Force Special Weapons Center, Kirtland Air
Force Base, New Mexico

1. Recommend that this resignation be approved in lieu of further
elimination action under AFR 35-66.
2. Officer is not:
 - a. Under investigation.
 - b. Under charges.
 - c. Awaiting result of trial.
 - d. Absent without leave.
 - e. Absent in the hands of civil authorities.
 - f. Insane.
 - g. In default with respect to public property or funds.
3. There has not been a report of recent misconduct on the part
of this officer which is not shown herein.
4. Officer is not accountable or responsible for public property
or funds.
5. Officer has been afforded the opportunity of consulting legal
counsel.
6. Formal court-martial charges have not been preferred. Attached
is a complete case file of all the facts upon which this resignation
is based.
7. There is no reasonable ground for the belief that the accused

is, or was, at the time of his misconduct, mentally defective, deranged, or abnormal.

8. Personnel data of interest that is not available to the officer exercising general court-martial jurisdiction is reflected on the enclosed copy of the officer's AF Form 11.

9. Granting the request in paragraph 10 of basic letter, this officer's records reflect commendable service in all other respects except this serious misconduct. His performance for the period 24 November 1956 to 31 May 1958 was rated outstanding in the two effectiveness reports covering that period. Despite this record, this headquarters finds no basis for claim to unusual extenuating circumstances in the interpretation of par 4, AFR 35-66.

4 Incls

1. Cy of Ltr of notification
2. Medical Examination
3. Cy of AF Form 11
4. Cy of Investigation Report - w/d BMD

/s/

DANIEL E. HOOKS
Brigadier General, USAF
Commander

Standard Form 88
(Rev. June 1956)

PORT OF MEDICAL EXAMINATION

1. LAST NAME—FIRST NAME—MIDDLE NAME INGALLS, MURRAY HAROLD			2. GRADE AND COMPONENT OR POSITION Major USAF		3. IDENTIFICATION NO. 11599A
4. HOME ADDRESS (Number, street or RFD, city or town, zone and State) 604 Monroe Ave. Alamogordo, New Mexico			5. PURPOSE OF EXAMINATION Separation		6. DATE OF EXAMINATION 13 March 1959
7. SEX Male	8. RACE Caucasian	9. TOTAL YEARS GOVERNMENT SERVICE MILITARY 16 CIVILIAN 0		10. AGENCY DAF	11. ORGANIZATION UNIT Hq, AFMDC
12. DATE OF BIRTH 16 May 19(39)		13. PLACE OF BIRTH Manchester, New Hampshire		14. NAME, RELATIONSHIP, AND ADDRESS OF NEXT OF KIN Hildegard W. Ingalls (Wife) Same as 4 above	
15. EXAMINING FACILITY OR EXAMINER AND ADDRESS USAF Hospital, Holloman AFB, New Mexico				16. OTHER INFORMATION	
17. RATING OR SPECIALTY				TIME IN THIS CAPACITY (Total) -- LAST SIX MONTHS --	

CLINICAL EVALUATION			NOTES. (Describe every abnormality in detail. Enter pertinent item number before each comment. Continue in item 73 and use additional sheets if necessary.)
NOR- MAL	(Check each item in appropriate column, enter "NE" if not evaluated.)	ABNOR- MAL	
X	18. HEAD, FACE, NECK, AND SCALP		
X	19. NOSE		
X	20. SINUSES		
	21. MOUTH AND THROAT	X	
X	22. EARS—GENERAL (Int. & ext. canals) (Auditory acuity under items 70 and 71)		
X	23. DRUMS (Perforation)		
X	24. EYES—GENERAL (Visual acuity and refraction under items 59, 60 and 61)		
X	25. OPHTHALMOSCOPIC		
X	26. PUPILS (Equality and reaction)		
X	27. OCULAR MOTILITY (Associated parallel movement, nystagmus)		
X	28. LUNGS AND CHEST (Include breasts)		
X	29. HEART (Thrust, size, rhythm, sounds)		
X	30. VASCULAR SYSTEM (Arteriosclerosis, etc.)		
	31. ABDOMEN AND VISCERA (Include hernia)	X	
X	32. ANUS AND RECTUM (Hemorrhoids, fistula, fissure, if indicated)		
X	33. ENDOCRINE SYSTEM		
X	34. G-U SYSTEM		
X	35. UPPER EXTREMITIES (Strength, range of motion)		
X	36. FEET		
	37. LOWER EXTREMITIES (Exposed feet) (Strength, range of motion)	X	
X	38. SPINE, OTHER MUSCULOSKELETAL		
X	39. IDENTIFYING BODY MARKS, SCARS, TATTOOS		
X	40. SKIN, LYMPHATICS		
X	41. NEUROLOGIC (Equilibrium tests under item 78)		
X	42. PSYCHIATRIC (Specify any personality deviation)		
	43. PELVIC (Females only) (Check how done)		
	☐ VAGINAL— ☐ RECTAL		

21. Tonsils emucleated.

Surgeon General, USAF
Washington, D.C.

APR 6 1959

Approved for Separation

31. 4-in. RLQ surgical scar, (Appendectomy) WHNS.

37. 5 cm. diameter fluctuant cyst post. aspect left knee, (Bakers cyst). No limitation of range of motion or strength.

Dosed

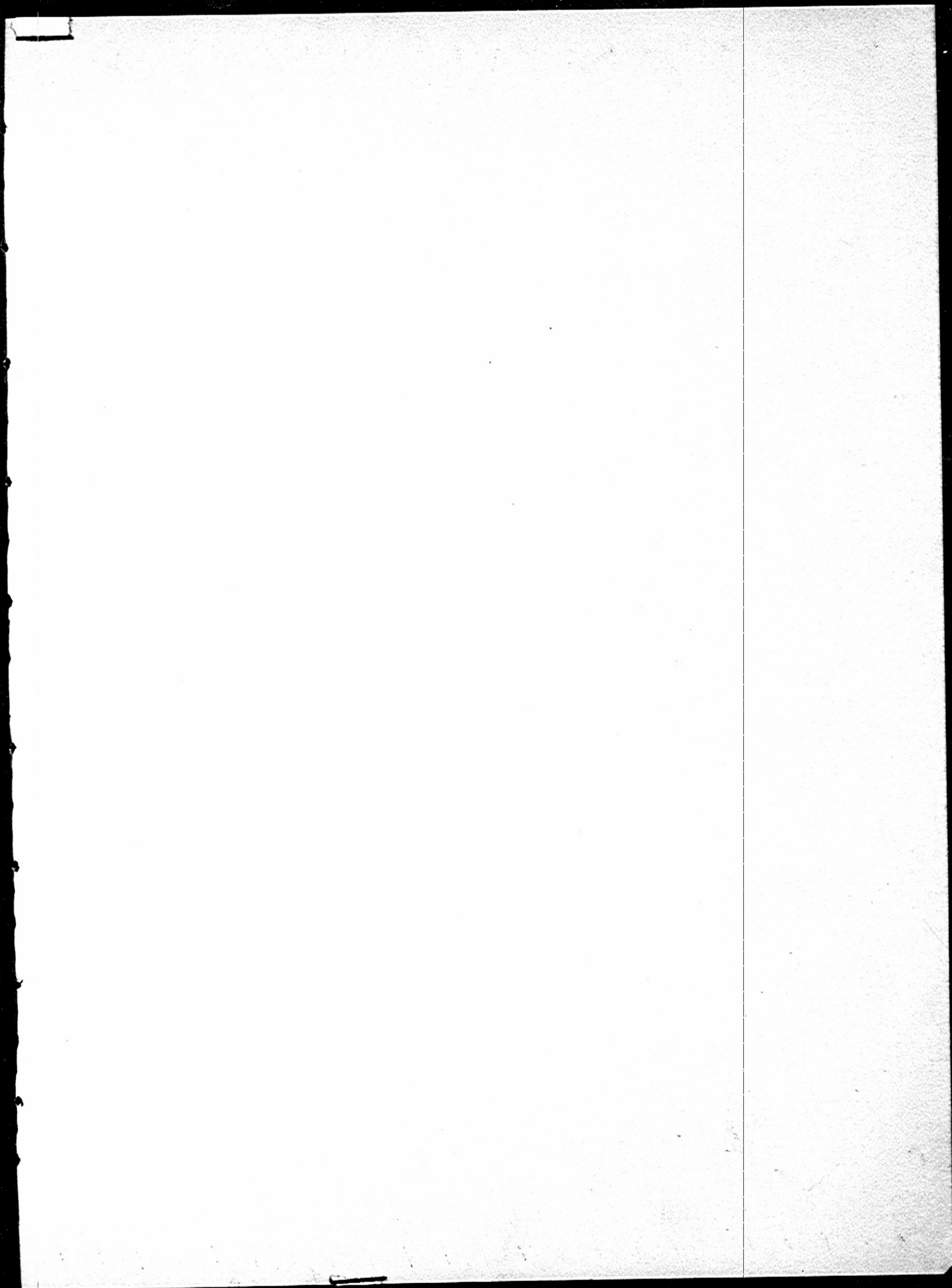
(Continue in item 73)

44. DENTAL (Place appropriate symbols above or below number of upper and lower teeth, respectively.)																		REMARKS AND ADDITIONAL DENTAL DEFECTS AND DISEASES	
O—Restorable teeth T—Nonrestorable teeth X—Missing teeth XXX—Replaced by dentures (X N)—Fixed bridge, brackets to include abutments																			
R	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	L		
I	X	0															X		
G	X	31	30	29	28	27	26	25	24	23	22	21	20	19	18	17	X		
H																			
Y																			

Class 2 -

LABORATORY FINDINGS

45. URINALYSIS: A. SPECIFIC GRAVITY 1.017		46. CHEST X-RAY (Place, date, film number and result) HAFB, N. Mex. 12 Mar 59	
B. ALBUMIN Negative	D. MICROSCOPIC Negative	59-1240	Negative
C. SUGAR Negative			
47. SEROLOGY (Specify test used and result) VDRL - Negative	48. EKG -	49. BLOOD TYPE AND RH FACTOR -	50. OTHER TESTS -



MEASUREMENTS AND OTHER FINDINGS																																			
51. HEIGHT 65 1/2		52. WEIGHT 150		53. COLOR HAIR Brown		54. COLOR EYES Blue		55. BUILD ☐ SLENDER ☒ MEDIUM ☐ HEAVY ☐ OBESE			56. TEMPERATURE 98.6																								
57. BLOOD PRESSURE (Arm at heart level)						58. PULSE (Arm at heart level)																													
A. SITTING SYS 136 DIAL 80		B. RECUMBENT SYS DIAL		C. STANDING (2 min.) SYS DIAL		A. SITTING 88		B. AFTER EXERCISE 130		C. 2 MIN. AFTER 92																									
59. DISTANT VISION						60. REFRACTION			61. NEAR VISION																										
RIGHT 20/17		CORR. TO 20/		BY		S.		OX		20/20 CORR. TO																									
LEFT 20/15		CORR. TO 20/		BY		S.		OX		20/20 CORR. TO																									
62. METEOROPHORIA (Specify distance)																																			
15"		EX"		R. H.		L. H.		PRISM DIV.		PRISM CONV. CT																									
63. ACCOMMODATION				64. COLOR VISION (Test used and result)				65. DEPTH PERCEPTION (Test used and score)																											
RIGHT - LEFT -				Normal AOC Abridged				UNCORRECTED -																											
66. FIELD OF VISION				67. NIGHT VISION (Test used and score)				68. RED LENS TEST																											
Normal								69. INTRAOCULAR TENSION																											
								Normal																											
70. HEARING						72. PSYCHOLOGICAL AND PSYCHOMOTOR (Tests used and score)																													
RIGHT WY 15 /15 SV 15 /15						AUDIOMETER																													
LEFT WY 15 /15 SV 15 /15						250 500 1000 2000 3000 4000 6000 8000																													
						RIGHT 10 0 10 5 10 30 40 50																													
						LEFT 10 10 10 0 10 20 60 75																													
73. NOTES (Continued) AND SIGNIFICANT OR INTERVAL HISTORY																																			
Mumps, chicken pox and measles in childhood, no comp. or seq. Sugar in urine in teens, clinically treated, no comp. or seq. Appendectomy 1941, no comp. or seq. Jaundice 1943 as result of acute hepatitis, no comp. or seq. Tonsillectomy 1945, normal recovery. Has had "catch" in elbow for past six years, no loss of motion or deformity. Pain in 1956 in chest, clinically evaluated and treated, no (comp. or seq.) Fainting and dizziness from 1953 to present. Clinically treated in 1953. Still occurs on standing up too fast. Sinusitis occasionally, mild, easily controlled. Soaking night sweats approximately 50% of time. Reason unknown. Allergic to penicillin. Loss of memory as result of over indulgence of alcoholic beverages.																																			
74. SUMMARY OF DEFECTS AND DIAGNOSES (List diagnoses with item numbers)																																			
None.																																			
75. RECOMMENDATIONS - FURTHER SPECIALIST EXAMINATIONS INDICATED (Specify)																																			
None.																																			
76. A. PHYSICAL PROFILE																																			
<table border="1" style="width:100%; border-collapse: collapse;"> <tr> <td>P</td><td>U</td><td>L</td><td>H</td><td>E</td><td></td><td></td><td></td><td></td><td></td><td></td><td></td> </tr> <tr> <td>-</td><td>-</td><td>-</td><td>-</td><td>-</td><td>-</td><td>-</td><td>-</td><td>-</td><td>-</td><td>-</td><td>-</td> </tr> </table>												P	U	L	H	E								-	-	-	-	-	-	-	-	-	-	-	-
P	U	L	H	E																															
-	-	-	-	-	-	-	-	-	-	-	-																								
77. EXAMINEE (Check)																																			
A. ☒ IS QUALIFIED FOR Separation.																																			
B. ☐ IS NOT QUALIFIED FOR																																			
78. IF NOT QUALIFIED - LIST DISQUALIFYING DEFECTS BY ITEM NUMBER																																			
79. TYPED OR PRINTED NAME OF PHYSICIAN						SIGNATURE																													
L. E. EASON, CAPT. USAF-MC						[Signature]																													
80. TYPED OR PRINTED NAME OF PHYSICIAN						SIGNATURE																													
81. TYPED OR PRINTED NAME OF DENTIST OR PHYSICIAN (Indicate which)						SIGNATURE																													
82. TYPED OR PRINTED NAME OF REVIEWING OFFICER OR APPROVING AUTHORITY						SIGNATURE																													
						NUMBER OF ATTACHED SHEETS																													

DEPARTMENT OF THE AIR FORCE
Washington

Office of the Secretary

7 April 1959

MEMORANDUM FOR SEPARATIONS BRANCH
PROMOTIONS & SEPARATIONS DIVISION
DIRECTORATE OF MILITARY PERSONNEL

SUBJECT: Resignation for the Good of the Service

Upon recommendation of the Air Force Personnel Board, the Secretary of the Air Force accepts the resignation for the good of the service submitted on 12 March 1959, by Major Murray H. Ingalls, 11 509A, under the provisions of paragraph 7a, AFR 36-12, in lieu of action under AFR 35-66, and directs that he be issued a Discharge Certificate (under other than honorable conditions).

FOR THE DIRECTOR:

J. H. THOMPSON
Lt. Colonel, USAF
Executive
Secretary of the Air Force
Personnel Council

AFR 35-66

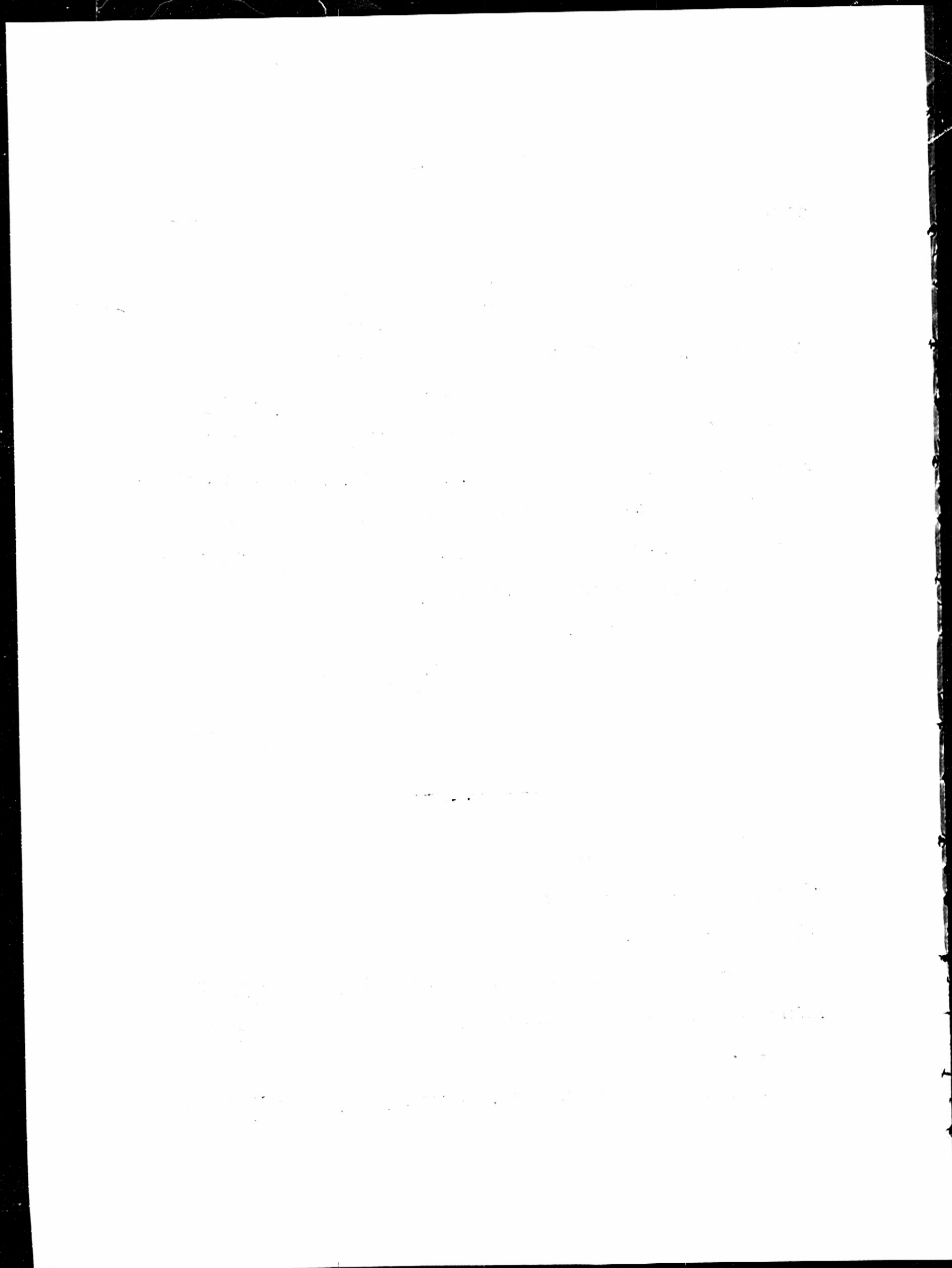
LETTER OF NOTIFICATION TO OFFICER
(CLASS II OR CLASS III)

SUBJECT: Letter of Notification

To: (Member Concerned)

1. This is to officially notify you that I am in receipt of information warranting the initiation of action against you under AFR 35-66.

2. Based upon this information there is reason to believe your



case falls within the category of a Class _____, as defined in paragraph 12, AFR 35-66. For your information, a copy of this regulation is attached; it explains the policy on this subject.

3. As a respondent under AFR 35-66, you may tender your resignation in accordance with the applicable provisions of AFR 36-12. If you do not elect to tender your resignation under 36-12, the commander of the major air command may consider elimination action under AFR 36-2. The cited administrative procedures do not preclude trial by general court-martial, if applicable and deemed appropriate.

4. Military counsel has been obtained to assist you (give rank and name). In lieu of appointed counsel you may have counsel of your choice, provided such counsel is serving in the active military service and is reasonably available. Also, in lieu of military counsel you have the right to employ civilian counsel, but if civilian counsel is employed it must be at your own expense as no funds are available for payment to civilian counsel under this authority. In the event you waive your right to military counsel, you are required to furnish a written statement to this effect, to be attached to the file in your case.

5. Request you confer with counsel concerning your case and advise me, without delay, of your intentions regarding paragraph 3 above. If you elect to submit your resignation, furnish your tender of resignation to me. If you do not elect to submit your resignation, furnish me with a written statement to that effect.

NOTE: The original of the letter of notification presented to the

respondent will not be classified. A copy of this letter of notification, properly noted to indicate the date and time of delivery, will be made a part of the documented case. However, no copy will be made a part of the Unit Personnel Records Group.

DONALD H. DALTON
815 Fifteenth Street, NW
Washington 5, D.C.

August 18, 1959

The Secretary of the Air Force
(Board for Correction of
Military Records)
Department of the Air Force
Washington 25, D. C.

Dear Sir:

Enclosed please find Application for Correction of the Military Record of Murray H. Ingalls, former major, USAF, file number 1159 A, who has retained me to represent him before the Board.

Will you please permit me to see the complete file in his case. A copy of the OSI report on Mr. Ingalls is requested.

A legal brief of the case will be presented later.

An oral hearing is requested.

Please send all correspondence in the matter to my office.

Respectfully submitted.

/s/

Donald H. Dalton

SAFCB 59-1267

5 May 1960

CERTIFIED

Dear Mr. Ingalls:

Reference is made to your request for correction of your military record, under the provisions of Section 1552, Title 10, United States Code, (70A Stat 116).

The administrative regulations and procedures established by the Secretary of the Air Force for the guidance of the Board provide that an application may be denied where the applicant has not submitted sufficient evidence to establish a showing of probable error or injustice in the case.

I regret to advise you that a careful consideration by the Board of your military record, together with such facts as have been presented by you, fails to establish a showing of probable error or injustice in your case. Therefore, in the absence of additional material evidence tending to show the commission of an error or injustice, no further action on your application is contemplated.

BY DIRECTION OF THE CHAIRMAN:

FRANK D. HARDIN
Executive Secretary
Air Force Board for the Correction of Military Record

Mr. Murray H. Ingalls
c/o Donald H. Dalton, Esquire
815 Fifteenth Street, NW
Washington, D. C.

Filed November 20, 1961

O R D E R

This cause having come on for hearing upon cross-motions for plaintiff and defendant for summary judgment, memoranda of points and authorities in support thereof and in opposition thereto, and the Court having considered said motion, exhibits filed herewith and the pleadings herein, and having heard oral argument in open Court thereon, and it appearing to the Court that there exists no genuine issue of material fact, and that defendant is entitled to judgment as a matter of law, it is this 20th day of November, 1961,

ORDERED that defendant's motion for summary judgment be and the same is hereby granted and that plaintiff's motion for summary judgment be and the same is hereby denied, and it is

FURTHER ORDERED that the complaint be and the same is hereby dismissed.

/s/ Alexander Holtzoff
JUDGE

Filed September 14, 1961

A F F I D A V I T

I, Ursel C. Nolte, being duly sworn before the undersigned Notary Public, depose and say as follows: On 28 October 1959, at Holloman AFB I was in the Office of Special Investigations in the presence of Mr. Murray Ingalls and OSI Agent Mr. Poy. Mr. Ingalls queried Mr. Poy concerning legal council not being afforded Mr. Ingalls with direct reference to allegations resulting in USAF Discharge of Mr. Ingalls.

Mr. Poy agreed that such service was not afforded to the best of his knowledge. However, he could not provide an affidavit to this effect unless approved by his supervisor. The proper address was provided by Mr. Poy for Mr. Ingalls to make an affidavit request.

STATE OF NEW MEXICO) ss:
COUNTY OF OTERO)

Ursel C Nolte

On this 17th day of December 1959, before me personally appeared Ursel C. Nolte, known to me to be the person described in and who executed the foregoing affidavit and stated to me that he executed the same as his free act and deed to the end that it may be recorded as such.

Notary Public

Filed September 14, 1961

A F F I D A V I T

State of New Mexico: ss

I, Richard F. Chandler, being first duly sworn according to law,

depose and say: that I have known personally Major Murray H. Ingalls for approximately three years; that I am a mechanical engineer, employed on stress analyses at Holloman Air Force Base, Alamogordo, New Mexico; that I have served under Major Ingalls as a lieutenant and as a G.S.11; that I know Major Ingalls socially; that our families have visited each other many times; that the general reputation as a normal man is the reputation of Major Ingalls in the community; that his reputation for truth and veracity is excellent; that his personal character is excellent.

/s/

RICHARD F. CHANDLER

Subscribed and sworn to before me, a notary public, on this 24 day of August, 1959.

/s/

Notary Public

Filed September 14, 1961

A F F I D A V I T

State of New Mexico: ss

I, Ursel C. Nolte, being first duly sworn according to law, depose and say: that I am a major and command pilot in the United States Air Force; that I am chief of the Instrumentation Branch at Holloman Air Force Base, Alamogordo, New Mexico; that I have known personally Major Murray H. Ingalls for approximately three years, in a professional capacity; that I have known Major Ingalls personally and socially for approximately three years; that we have flown throughout the United

States together on airplanes; that our families have visited back and forth many and numerous times and that we have gone on outings together; that Major Ingalls is of excellent character; that his character, among people that know him, is that of a normally sexually adjusted male; that his character for truth and veracity is excellent; that his personal character is excellent.

/s/
Ursel C. Nolte

Subscribed and sworn to before me this 24th day of August, 1959.

/s/
Notary Public

Filed September 14, 1961

A F F I D A V I T

State of New Mexico: ss

I, Grace Nolte, being first duly sworn according to law, depose and say that I am the wife of Major Ursel R. Nolte; that I have known personally Major Murray H. Ingalls for approximately three years; that I have known Major and Mrs. Ingalls socially for approximately three years; that our families have visited back and forth many and numerous times during the past three years; that Major Ingalls has a general reputation as a normal healthy man; that his personal character is excellent.

/s/
Grace Nolte

Subscribed and sworn to before me this 24th day of August, 1959.

/s/
Notary Public

Filed September 14, 1961

A F F I D A V I T

I, Warren M. Sanders, being first duly sworn according to law, depose and say: that I am a former officer in the Air Force and pilot, and at present am an electronic engineer, and personally have known Major Murray H. Ingalls for approximately three years; that I am employed at Holloman Air Force Base, Alamogordo, New Mexico; that I live at 1720 Van Court, Alamogordo, New Mexico; that I personally served under Major Ingalls as his assistant for one and one-half years; that I know Major and Mrs. Ingalls socially and have visited with them many times; that Major Ingalls is of excellent personal character; and that he has a general reputation as a normal well adjusted man.

/s/ _____
Warren M. Sanders

Subscribed and sworn to before me, a notary public, on _____ day
of August, 1959.

/s/ _____
Notary Public

Filed September 14, 1961

A F F I D A V I T

I, Bascom E. Tillotson, being first duly sworn according to law, depose and say: that I am a major in the United States Air Force, now stationed in the Pentagon, Washington 25, D. C.; that I have personally known Major Murray H. Ingalls for approximately seven years; that I have served, professionally, with him in Freising, Germany; that I have been

socially acquainted with Major Ingalls for seven years; that Mrs. Tillotson and I have had Major and Mrs. Ingalls for our guest many and numerous times; that Major Ingalls has always conducted himself as a gentleman; that he is of excellent military character; that he is of excellent personal character.

/s/

BASCOM E. TILLOTSON, JR.

Subscribed and sworn to before me this 12 day of September, 1959.

/s/

Notary Public
Alexandria, Virginia

Filed September 14, 1961

A F F I D A V I T

City of Alexandria) ss:
State of Virginia)

I, Lela Tillotson, being first duly sworn according to law, depose and say: That I am the wife of Major Bascom E. Tillotson, now stationed in the Pentagon, Washington, D. C.; that we live at 2939 Bryan Street, Alexandria, Virginia; that I have known Major Murray H. Ingalls for approximately seven years; that I have known him socially in Germany and also in the United States for approximately seven years; that Major and Mrs. Murray H. Ingalls have been our guests many and numerous times; that Major Ingalls has always conducted himself as a gentleman; that he is of excellent personal character; that his character for truth and veracity is excellent; that he is definitely

a normal human being, with no abnormal aberrations; and that his character, as a normally sexually adjusted male, has never been questioned.

/s/ _____
Lela Tillotson

Subscribed and sworn to before me this 12th day of September, 1959.

/s/ _____
Notary Public

FRANK S. CAPRICO, M. D.
Columbia Medical Building
1835 Eye St. N. W.
Washington 6, D.C.

February 1, 1960

Psychiatric Examination Report

TO WHOM IT MAY CONCERN:

Re: Ingalls, Murray
5 Linden Ave.,
Tilton, New Hampshire

On August 14th. and August 17, 1959 I conducted a comprehensive psychiatric survey consisting of a series of interview-examinations of Major Murray Ingalls, at the request of his attorney Donald Dalton (815 - 15th St. N. W., Washington, D. C.).

The survey covered such aspects of his life as his family background, childhood, adolescence, education, occupational activities, religious affiliation, social life, personality study, his marriage and a detailed account of his sex life as well as the events during his military service that led to his resignation on April 23, 1959.

The findings of the above examinations failed to disclose any evidence

of any sexual aberration. There was nothing in his background to indicate that he is a homosexual or that he ever had homosexual tendencies. He has been married twelve years, has two children and has made a normal, healthy adjustment in marriage. I have had an opportunity to talk with his wife and she has assured me that he has never given her any grounds to suspect any sexual difficulty of any kind.

Based on the information that I could ascertain he was never given an opportunity to receive a thorough psychiatric examination while in the military service and he feels had he had this opportunity he could have explained how he had become victimized by an unfortunate set of circumstances. He had also suffered from a knee injury and feels that he did not receive the benefit of adequate treatment. He comes from a very good family background, has a college degree from the University of New Hampshire, has had a good military service record as evidenced by two honorable discharges in 1942 and 1945. He was very shocked when he was given his last discharge, the kind that he feels will handicap him for the rest of his life, as far as his career ambitions are concerned. I have had the opportunity of examining many hundreds of sex offenders and have written many books in this field which are being used as reference works by psychiatrists and lawyers. I mention this only because I feel quite confident that Major Ingalls is not a homosexual as there is insufficient evidence to corroborate making such a diagnosis. In view of this fact I feel that his case merits reconsideration by the military review board.

Respectfully,

Frank S. Caprio M.D.

DRS. COBEY and RUSH
1726 Eye Street, N.W.
Washington 6, D. C.

August 12, 1959

Mr. Donald H. Dalton
815 15th Street, N. W.
Washington, D. C.

Re: Murray H. Ingalls

Dear Mr. Dalton:

Mr. Murray H. Ingalls came to see me today, August 12, 1959 because of a painful Baker's cyst in the popliteal space of the left knee that has been present for two and one-half years. The patient stated that this was present approximately six months before discharge from the army. He was seen by Dr. Louis Breck of El Paso, Texas who is consultant for the air forces at the base where he was stationed. Dr. Breck stated that this was a Baker's cyst. Why this cyst was not removed, since this is a ganglion of the capsule of the knee joint, to give this patient a normal knee I do not know. It certainly should be removed because this patient is going to have pain in the back of the knee and pain in the calf of the leg and some pain running up the back of the thigh until this is done, and certainly will be disabled as a result of this cyst which is a large cyst now measuring approximately 3 cm. in diameter and definitely interfering with flexion of the leg and full extension of the leg because of its size.

Sincerely yours,

/s/

Milton C. Cobey, M.D.

Filed September 14, 1961

Ingalls, Murray

9/15/59

The results of a survey of Mr. Murray Ingalls, 40, may be summarized as follows:

This gentleman desires a general survey. He gives a history of right thoracic pain as described in the attached clinical history, and he reports the existence of a cyst in the left popliteal space.

Mr. Ingalls also reports mild bowel looseness and certain other digestive symptoms as recorded in the history.

Physical examination: the patient is normally nourished. He does not appear acutely ill. Routine examination of the head and neck reveals nothing of significance. It is noted that the tonsils have been cleanly removed. The thyroid gland is normal to palpation.

No cervical adenopathy or adenopathy elsewhere. Routine examination of the heart and lungs reveals no evidence of organic disease. The peripheral arteries and joints are not remarkable except for the existence of a cystic formation the size of an English walnut in the popliteal space of the left knee. Routine examination of the various abdominal organs is negative. Digital rectal examination is also negative.

Anoscopic examination: internal hemorrhoids of moderate size. Proctoscopic to 21 cm.: the bowel to this level is reddened and appears slightly edematous, no ulcerations observed.

Laboratory studies: temperature, 99.6; blood pressure, 136-80; complete blood count normal - hemoglobin, 104%; red cells, 5,060,000; white cells, 6900. Fasting blood sugar, 111 mg.%, normal (no tendency to diabetes). Bromsulfalein liver function test, normal, no dye

remaining after thirty minutes. Urine normal; stool negative for occult blood; special study of stool for amebae and other parasites, negative. Electrocardiographic studies, resting and after double exercise tolerance test, reveal no abnormality.

Discussion: This survey has to date revealed only the following positive considerations:

- (1) A cystic formation involving the popliteal space of the left knee, so-called Baker's cyst.
- (2) A general reddening of the mucous membrane of the rectosigmoid without definite ulceration.
- (3) On one check, a low-grade fever.

No explanation is established of the recurrent right thoracic pain.

I believe that this diagnostic effort should be carried on further, in that the reason for the patient's diarrheal tendency has not been adequately established.

I should like Mr. Ingalls to report back to me and I will carry out additional studies.

Mr. Donald H. Dalton
815 Fifteenth Street, N. W.
Washington, D. C.

Dear Mr. Dalton:

I am sending along my notes on Mr. Murray Ingalls. You will find them incomplete, in that I have not had the opportunity of carrying out necessary studies on the gastro-intestinal tract. I hope that Mr. Ingalls may return to me for this.

It was good of you to send Mr. Ingalls to the office.

With kind regards, I am

Sincerely,

Matthew White Perry, M.D.

The bromsulfalein liver function test was done because this patient reported having had a hepatitis. The test gave a normal value in relation to the elimination of the dye and thereby gave evidence of a normal liver now existing.

Matthew White Perry, M. D.

Filed November 22, 1961

NOTICE OF APPEAL

Notice is hereby given this 22nd day of November, 1961, that MURRAY H. INGALLS hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 20th day of November, 1961 in favor of defendant against said MURRAY H. INGALLS.

Donald H. Dalton
Attorney for Plaintiff

Filed September 14, 1961

HDW, AFMDC, SUBJECT: USAF OFFICER EFFECTIVENESS REPORT

HDG

1st Ind

HQ Air Force Missile Development Center, Holloman AFB NMex

TO: Commander, Air Research and Development Command,
Andrews Air Force Base, Washington 25, D. C.

Although I have not had many opportunities to observe directly the work of Major Ingalls, I am well aware of the performance of the Test Track Division, and the contribution he has made to the work in constructing and testing the new high speed sleds. I heartily endorse the rating given.

/s/

L. I. DAVIS, 1111A
Major General, USAF
HEDAFMDC

Filed September 14, 1961

HDW, HEDHADC, SUBJECT: OFFICER EFFECTIVENESS REPORT
Major Murray H. Ingalls, 11599A

HDG

1st Ind

HQ Holloman Air Development Center, Holloman AFB NMex

TO: Commander, Air Research and Development Command,
Post Office Box 1395, Baltimore 3, Maryland

I concur in the outstanding rating on Major Ingalls.

/s/

L. I. DAVIS
Major General, USAF
Commander

TRANSCRIPT OF PROCEEDINGS

November 9, 1961

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

before Judge Holtzoff

* * * * * OPINION OF THE COURT

THE COURT: The Court is of the opinion that the validity and the effect of the resignation must be governed by the regulation that was in effect at the time that the resignation was tendered and accepted, not as of the time when it became effective, which was at a later date.

The Court is further of the opinion that the standard medical examination, which was to include a psychiatric consultation, did not have to be made if the officer tendered his resignation in lieu of further action.

In view of these considerations, the Court finds it unnecessary to pass on the question of laches.

The defendant's motion for summary judgment is granted.

MR. DALTON: If your Honor please, would you mind if I call your attention to the wording of Section 14, which that falls under?

THE COURT: I read it.

MR. DALTON: The beginning, sir?

THE COURT: I am going to grant the motion. I am afraid I have no alternative except to do that, Mr. Dalton.

Thank you, gentlemen.

(Thereupon, the hearing stood concluded.)

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BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16788

MURRAY H. INGALLS, APPELLANT

v.

EUGENE M. ZUCKERT, SECRETARY OF THE AIR FORCE, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

DAVID C. ACHESON,
United States Attorney.

NATHAN J. PAULSON,
DANIEL A. REZNECK, ✓
Assistant United States Attorneys.

United States Court of Appeals
for the District of Columbia Circuit

FILED APR 30 1962

Joseph W. Stewart

CLERK

QUESTION PRESENTED

In the opinion of the appellee, the following questions are presented:

1. Was appellant's separation from the Air Force valid and in compliance with applicable regulations, where the record discloses that: he received appropriate notice of the charge against him and the possible alternatives open to him; he elected to resign for the good of the service in lieu of action to eliminate him from it; the applicable regulation did not require the service to furnish counsel unless an officer elected to face a military board; his resignation was voluntary and with knowledge of the possible consequences; and the Secretary of the Air Force acted in accordance with service policy in discharging him under other than honorable conditions?

2. Was appellant denied a psychiatric examination to which he was entitled prior to separation, where the applicable regulation placed such an examination within the discretion of the military authorities? Should he have been retired for physical disability, where he never applied for such retirement but submitted his resignation for the good of the service?

3. Can appellant maintain this action, where he waited over a year after the final administrative determination in his case before filing suit in court?

(I)

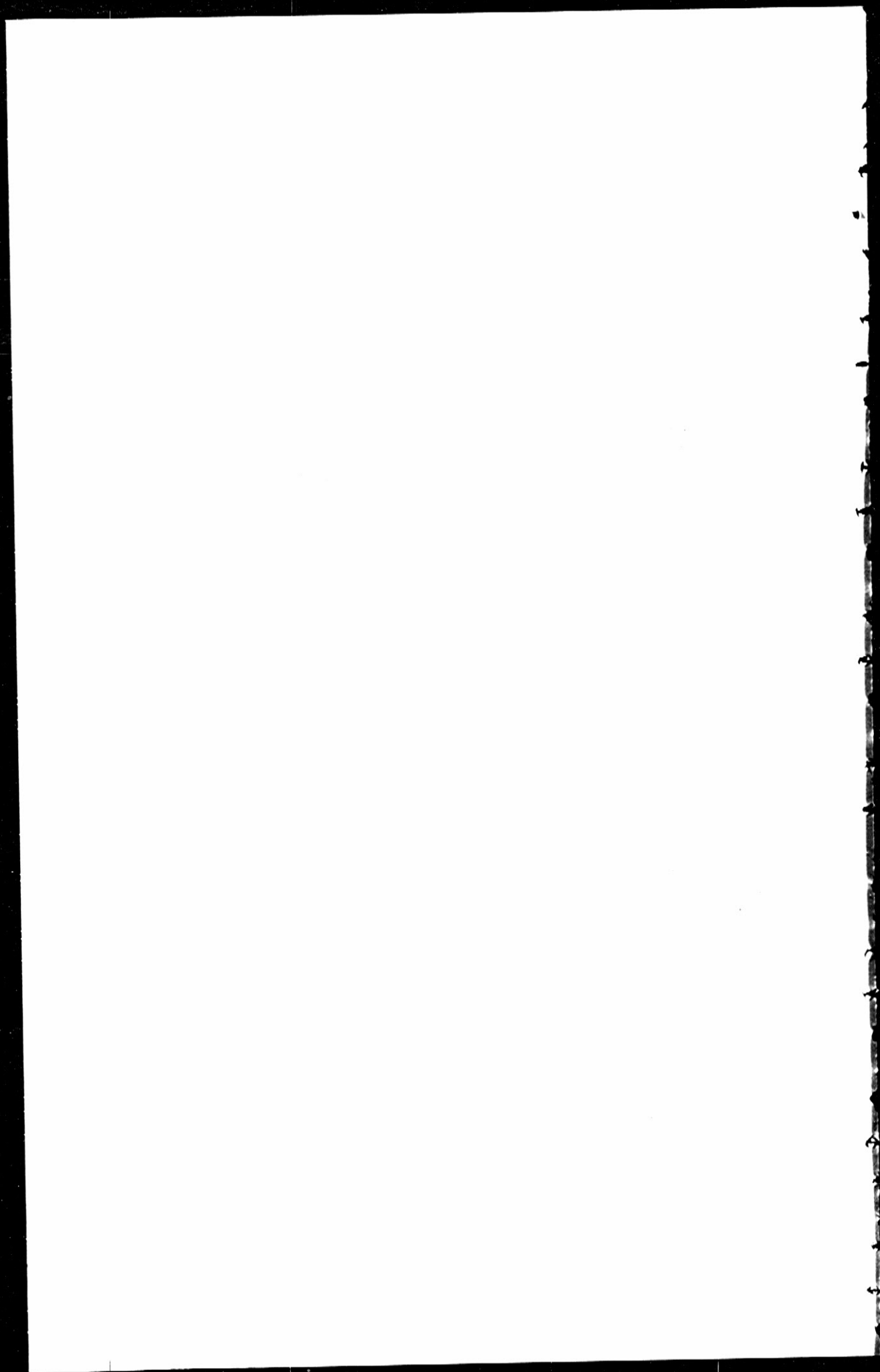
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*Case chiefly relied upon is marked by asterisk.



United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16788

MURRAY H. INGALLS, APPELLANT

v.

EUGENE M. ZUCKERT, SECRETARY OF THE AIR FORCE, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

Prior to his discharge, appellant was on active duty with the U.S. Air Force, holding the rank of major. He was stationed at Holloman Air Force Base, New Mexico.

On March 9, 1959, appellant received a letter of notification from the commander of the Air Force Missile Development Center at Holloman Air Force Base. It stated that information had been received substantiating discharge action against appellant under Air Force Regulation 35-66. This information gave reason to believe that appellant was a Class II homosexual under Air Force Regulation 35-66.¹ The letter

¹ The regulation divided homosexuality cases into several categories. Class II was defined as follows:

"Those cases where a member, while serving in the active military service, has willfully engaged in one or more homosexual acts, or has proposed or attempted to perform an act of homosexuality which do not fall into the class I category."

Class I included homosexual acts accompanied by assault or coercion. AFR 35-66, 23 July 1956, paragraph 12.

enclosed a copy of the regulation and informed appellant that the following actions would now be initiated:

a. As a class II respondent, your case will be referred to the appropriate authority for consideration of trial by general court-martial.

b. As a class II respondent you may request discharge under other than honorable conditions in lieu of further action under Air Force Regulation 35-66 utilizing the attached format which is self-explanatory.

c. As a class II respondent, you may request that your case be considered by a board of officers as prescribed in section C of AFR 35-66. The functions of this board and your rights, including the availability of legal counsel, where desired, are fully explained in AFR 35-66. (J.A. 15-16).

On March 12, 1959, appellant tendered his resignation for the good of the service, in accordance with the provisions of paragraph 7a, AFR 36-12, 22 March 1954.² He stated that he made the tender "voluntarily" and that "I fully understand that if this resignation is accepted I may be discharged under other than honorable conditions from all appointments held by me." (J.A. 17)

He further stated:

2. The reason for the submission of this resignation is: I am being considered for elimination from the service under AFR 35-66 (class II). I am tendering my resignation for the good of the service in lieu of fur-

² In pertinent part, this paragraph, as amended by AFR 36-12A, 27 July 1954, reads as follows:

"7. Resignation for the Good of the Service:

"a. General. Officers separated under this paragraph normally will be discharged under other than honorable conditions unless otherwise specifically directed by the Secretary of the Air Force.

* * * * *

"(3) An officer who is being considered for elimination from the service under paragraph 5, AFR 35-66, 12 January 1951 (Class II) may tender his resignation for the good of the service in lieu of further elimination action under that Regulation. If the officer refuses to tender a resignation, action will be taken as otherwise indicated in paragraph 5, AFR 35-66."

ther elimination action under that regulation in accordance with paragraph 7a, AFR 36-12.

* * * * *

6. I have been afforded the opportunity of consulting legal counsel regarding the advisability of submitting this resignation. (J.A. 17-18)

Appellant requested in his tender that he be considered for a general rather than an undesirable discharge. He also stated:

I prefer resignation rather than board action or court-martial because in either case these actions would bring more discredit upon the Air Force, and myself, because of the publicity they would create. (J.A. 18)

On March 13, 1959, appellant received a medical examination for purposes of separation and was pronounced qualified for separation. (J.A. 21-22) His commander recommended that his resignation be approved in lieu of further elimination action under AFR 35-66. (J.A. 19-20) With respect to appellant's request for a general discharge, the commander stated that despite appellant's otherwise "commendable" service record, headquarters found no basis for claim to "unusual extenuating circumstances" in the interpretation of paragraph 4, AFR 35-66.³

On April 7, 1959, the Secretary of the Air Force, upon recommendation of the Air Force Personnel Board, accepted appellant's resignation for the good of the service under the provisions of paragraph 7a, AFR 36-12, in lieu of action under AFR 35-66. The Secretary directed that appellant be issued a discharge certificate under other than honorable conditions. (J.A. 23)

On April 9, 1959, appellant was notified that he was relieved from his assignment, effective April 24, 1959, on which date his resignation was accepted by the President under paragraph 7a(3), AFR 36-12. He was also notified that he was discharged

³ Paragraph 4 of the regulation stated, in pertinent part:

"b. *Class II*—Normally, discharge under other than honorable conditions is appropriate. Exceptions to permit honorable discharge or discharge under honorable conditions (General Discharge Certificate) are proper only under unusual extenuating circumstances."

as of that date under other than honorable conditions. (J.A. 15)

Appellant applied to the Air Force Board for Correction of Military Records for review of his discharge in August 1959. (J.A. 25) On May 5, 1960, the Board denied the application for review, finding that a consideration of appellant's record and the facts presented by appellant failed to establish a showing of probable error or injustice in his case. (J.A. 26)

Appellant then brought suit on May 22, 1961, in the court below for a declaratory judgment that his discharge was unlawful and that he had never been legally separated from the service and for a mandatory injunction requiring the Secretary of the Air Force to restore him to his position in the service with full rights and benefits accrued from the date of his discharge. (J.A. 2-5) Appellant alleged that the action of appellee was beyond appellee's statutory authority,* was not authorized by any applicable rules and regulations of the Air Force, and was arbitrary and capricious and in violation of the due process clause of the Fifth Amendment. (J.A. 4) Specifically, he asserted that he was given 72 hours to sign his resignation, that he did not have legal counsel, nor was legal counsel available to him, military counsel was not provided him, and counsel was refused him although requested. He said that he signed his tender of resignation without the advice of counsel and without the opportunity of consulting counsel, and counsel was refused him. He also alleged that he was found qualified for separation after a "superficial and inadequate" medical examination, that he was refused a psychiatric examination at that time, contrary to law, that no electrocardiogram was given him, contrary to law, and that he was suffering from physical disabilities at the time of his discharge. (J.A. 3) He stated that the character of his service was such as would entitle him to be continued on active duty, or retired for physical disability, or granted an unqualified resignation or an honorable discharge. (J.A. 5)

Appellee moved for summary judgment on September 14, 1961. (J.A. 6) Appellant opposed the motion and made his

* Appellee was not actually Secretary of the Air Force at the time of appellant's discharge.

own motion for summary judgment. (J.A. 8) After oral argument the court below granted appellee's motion for summary judgment, denied appellant's, and dismissed appellant's complaint. (J.A. 27) This appeal followed. (J.A. 38)

STATUTES AND REGULATIONS INVOLVED

10 U.S.C. § 8012(f) provides:

The Secretary [of the Air Force] may prescribe regulations to carry out his functions, powers, and duties under this title.

AFR 35-66, 23 July 1956, paragraph 13b(1) provides:

13. *How Cases Will Be Processed:*

b. *Class II.* When investigation indicates that a member should be classified as class II, he will be confronted with the nature of the evidence against him which will be concurrently confirmed by a letter of notification * * * Disposition will be made as follows:

(1) *Officers* will be informed that they may tender a resignation for the good of the service in accordance with paragraph 7a(3), AFR 36-12, 22 March 1954. If a resignation is tendered, it will be prepared and forwarded in accordance with AFR 36-12 to the officer exercising general court-martial jurisdiction. The correspondence will have attached thereto all the documents required by paragraph 14a (9) through (13).

AFR 35-66, 23 July 1956, paragraph 14a(11) provides:

14. *How Cases Will Be Documented and Forwarded.*

Except in those cases where an officer tenders his resignation in lieu of further action under this regulation, cases which fall within the purview of this regulation will be documented and forwarded as follows:

(a) * * *

(11) Standard medical examination, recorded on Standard Form 88, "Report of Medical Examination," to include psychiatric consultation, if feasible.

AFR 35-66, 23 July 1956, paragraph 20c(1) provides:

20. *Procedures For Boards:*

Rights of Respondent. A respondent whose case is

presented to a board of officers convened under this regulation will have the following rights:

(1) *Personal Appearance or Representation.* The respondent may appear in person, with or without counsel, or be represented by counsel in his absence at all open proceedings of the board. He will not be reimbursed for expenses incident to the appearance or assistance of civilian counsel, to include military personnel not serving on extended active duty. He may have military counsel of his choice provided that such counsel is serving in the active military service and is determined to be reasonably available by the appropriate commander.

AFR 35-66, 17 March 1959, 13b(1) provides:

13. *How Cases Will Be Processed:*

b. *Class II.* When investigation indicates that a member should be classified as Class II, military counsel, who if reasonably available should be a lawyer, will be obtained for the member. Thereafter, the member will be confronted with the nature of the evidence against him, which will be concurrently confirmed by a letter of notification. (See paragraph 9 and attachment 3 or 4 of this regulation, as applicable.)

Disposition will be made as follows:

(1) An officer will be informed by his immediate commander that he may tender a resignation for the good of the service in accordance with the applicable provisions of AFR 36-12. If a resignation is tendered, it will be prepared and forwarded in accordance with AFR 36-12 to the commander exercising general court-martial jurisdiction. The correspondence will have attached thereto all the documents required by paragraph 14a (9) through (12).

AFR 36-12, 22 March 1954, as amended by AFR 36-12A, 27 July 1954, paragraph 7a(3) provides:

7. *Resignation for the Good of the Service:*

a. *General.* Officers separated under this paragraph normally will be discharged under other than honorable

conditions unless otherwise specifically directed by the Secretary of the Air Force.

(3) An officer who is being considered for elimination from the service under paragraph 5, AFR 35-66, 12 January 1951 (Class II) may tender his resignation for the good of the service in lieu of further elimination action under that Regulation. If the officer refuses to tender a resignation, action will be taken as otherwise indicated in paragraph 5, AFR 35-66.

AFM 160-1, 30 April 1953, paragraph 44b provides:

44. *Electrocardiogram:*

b. Electrocardiogram will be done on the following:

- (1) Forty years of age or over.
- (2) Unsatisfactory response to exercise.
- (3) History of cardiac symptoms, such as substernal pain or dyspnea.
- (4) Sitting pulse under 50.
- (5) Any finding suggestive of cardiac abnormality.

SUMMARY OF ARGUMENT

I

Appellant was validly separated from the Air Force, in compliance with the applicable regulations. He received appropriate notice of the charge against him and the alternatives open to him. He voluntarily elected to submit a resignation for the good of the service, in lieu of action to eliminate him from it. His resignation was accepted and he was discharged in due course. He was denied no procedural right to which he was entitled. Failure to provide him with counsel was not in violation of regulations because under the regulation then in effect, the service had no obligation to provide him with counsel when he tendered his resignation. The later regulation on which appellant relies was inapplicable to his case because it did not become effective until the administrative processing of his resignation had been completed. His discharge under other than honorable conditions was an appropriate exercise of the Secretary's discretion to determine the

character of military discharges. The courts would not be justified in upsetting the Secretary's exercise of discretion, especially since appellant knew the possible consequences of his resignation and still voluntarily chose to tender it.

II

Appellant received an appropriate medical examination prior to his separation from the service. He was not denied any psychiatric examination to which he was entitled. Under the applicable regulation such an examination was not mandatory but was within the discretion of the examining authorities. Appellant cannot now contend that he should have been retired for physical disability, since he never applied for such retirement but submitted his resignation for the good of the service.

III

Appellant's claim is barred by laches. He waited more than a year after the final administrative determination in his case before filing suit in court. In view of the prejudice to the Government, his delay makes recovery inequitable.

ARGUMENT

I. Appellant was not denied procedural rights to which he was entitled

Appellant was validly separated from the Air Force, in full compliance with the applicable regulations of the service and after receiving all procedural rights to which these regulations entitled him. The facts he alleges are without legal significance and create no issue precluding summary judgment for appellee. This suit in essence is an effort by appellant to retract his earlier voluntary decision to resign for the good of the service, because he now believes that decision was ill-advised. Further, he is asking the courts to substitute their judgment for that of the Secretary of the Air Force in carrying out the Secretary's discretionary duty to determine the character of military discharges. Neither effort to undo the consequences of past decisions by appellant and the Secretary is justifiable. The court below therefore correctly granted summary judgment for appellee.

Appellant's separation was effected in accordance with the then applicable regulations, AFR 35-66 of July 23, 1956, and AFR 36-12 of March 22, 1954, as amended by AFR 36-12A of July 27, 1954. These regulations were promulgated by the Secretary of the Air Force pursuant to his rule-making authority,⁵ and appellant does not and cannot challenge their validity.

The discharge proceeding against appellant was initiated under paragraph 13b of AFR 35-66 of July 23, 1956. That section provided, in pertinent part:

13. *How Cases Will Be Processed:*

b. *Class II.* When investigation indicates that a member should be classified as class II, he will be confronted with the nature of the evidence against him which will be concurrently confirmed by a letter of notification. * * * Disposition will be made as follows:

(1) *Officers* will be informed that they may tender a resignation for the good of the service in accordance with paragraph 7a(3), AFR 36-12, 22 March 1954. If a resignation is tendered, it will be prepared and forwarded in accordance with AFR 36-12 to the officer exercising general court-martial jurisdiction."

There is no dispute that appellant received the proper letter of notification under this regulation, informing him of the charges, of the action to be taken by the military authorities, and of the alternatives open to him—tendering his resignation for the good of the service or electing to have his case considered by a board of officers, at which counsel would be available to him.

Appellant chose to follow the former course and tendered his resignation for the good of the service. He stated that he did so voluntarily, and he does not now allege that the tender of resignation was involuntary. Nor is there anything in the record to indicate in the slightest that his tender of resignation was not a free and voluntary decision.

In tendering his resignation under paragraph 7a of AFR

⁵ 10 U.S.C. § 8012(F) provides:

"The Secretary [of the Air Force] may prescribe regulations to carry out his functions, powers, and duties under this title."

36-12 appellant knew that he might well be discharged under other than honorable conditions. The regulations made that plain, and he explicitly stated in his tender that he was aware of the possible consequences of his decision. Indeed, part of his tender was a request that he be granted a general discharge on the basis of his service record.

Appellant's tender of resignation was processed in the normal course and was accepted by the Secretary of the Air Force under paragraph 7a, AFR 36-12. Action to eliminate appellant under AFR 35-66 was thereby rendered unnecessary. His discharge also took place in the regular course.

Appellant's assertions of defects in the procedures by which he was separated will not bear analysis. His allegations with regard to denial of counsel amount to a single objection—that the Air Force did not furnish him with counsel at the time he was notified of the pendency of the discharge action. But the applicable regulation, AFR 35-66, of July 23, 1956, made no provision for furnishing counsel at the initiating stage of the proceedings. It provided that counsel would be available if the officer elected to face a board of officers. But appellant did not do so and instead tendered his resignation for the good of the service. If the military authorities in fact declined to furnish appellant with counsel, on his request, after he received the letter of notification describing the alternatives open to him, that fact is immaterial. They had no obligation under the regulation to provide counsel. There is no allegation that the military authorities prevented appellant from consulting counsel of his own choosing between the time he received his letter of notification and the time he tendered his resignation. There was no provision in the regulations preventing an officer from consulting counsel of his own choosing, and appellant stated in his tender that he had been afforded the opportunity of consulting counsel concerning the advisability of submitting the resignation. Thus there was nothing arbitrary in the action of the military authorities, even if appellant's allegations are taken as true, unless the regulation itself was arbitrary in not requiring that counsel be furnished at the time of notification. But appellant does not appear to make any such contention, and it could not prevail in any event.

Appellant's reliance on the revised AFR 35-66 of 1959 is misplaced. Under that revision, paragraph 13b, counsel is furnished by the service at the time of notification. But it was inapplicable to appellant's case because it did not become effective until April 14, 1959. His resignation had been accepted by the Secretary of the Air Force on April 7, 1959. Appellant had been notified on April 9, 1959 of the acceptance of his resignation and his discharge. The administrative process had come to an end in his case by the time the new regulation became effective. That new regulation was obviously intended to be prospective in operation. That was the plain purpose of adopting the April 14 effective date.*

The fact that appellant's resignation and discharge took effect as of April 24, 1959 is of no consequence. Nothing remained to be done administratively in his case after his resignation was accepted. If there had been any further processing necessary in his case after April 14, the argument for applying the new regulations might be plausible though hardly axiomatic even then. But there is no reason to take a regulation explicitly made effective on a future date and apply it to cases already processed. *A fortiori* this is true where the provision in question concerns the procedures for handling a case, rather than the substantive standards by which the case is judged.

The fact that the revised regulation may have been in preparation by the Air Force prior to the time appellant was notified of the pendency of the discharge action is also of no legal consequence. If the service had wanted to make the regulation applicable to all cases pending from the time of its preparation, it could easily have done so. But it made the regulation effective as of the specified future date. Appellant is not entitled to require the Air Force to adopt and comply with some other regulation than that which it actually adopted. The most he can ask is that the service comply with its own applicable regulation. The Air Force did that in this case.

Appellant's contention that he should have been granted an honorable discharge on the basis of his service record miscon-

~~ceives the role of a court in reviewing the determinations of administrative officials as to such matters.~~
ceives the role of a court in reviewing the determinations of administrative officials as to such matters.

* The revised regulation was promulgated on March 17, 1959.

The function of the court in cases like this is not to
This court has said: ¹² "p. 11"

review the merits of a dismissal, but to determine whether the employee was accorded his statutory and procedural rights. (*Ellis v. Mueller*, 108 U.S. App. D.C. 174, 280 F. 2d 722 (1960))

As this Court said in *Hargett v. Summerfield*, 100 U.S. App. D.C. 85, 88, 243 F. 2d 29, 32 (1957), *cert. denied*, 353 U.S. 970:

employee removal and discipline are almost entirely matters of executive agency discretion, and * * * judicial review of such actions is ordinarily available only to determine if there has been substantial compliance with the pertinent statutory procedures provided by Congress and no misconstruction of governing legislation. This has resulted in an unbroken line of authorities holding that, so long as there was substantial compliance with applicable procedures and statutes, the administrative determination was not reviewable as to the wisdom or good judgment of the department head in exercising his discretion.

Cf. Houston v. Mason, 105 U.S. App. D.C. 377, 267 F. 2d 654 (1959).

Deference to this administrative discretion is especially appropriate with regard to the character of military discharges, in light of the responsibility of the Secretary of the Air Force for the maintenance of discipline in the military establishment. Independent judicial evaluation of discharges such as this one would undermine the policy of the Air Force expressed in AFR 35-66.

In view of appellant's awareness of the consequences of his decision to resign for the good of the service and in the absence of any allegation or suggestion of coercion or overreaching by the military authorities, he should not now be allowed to override either his own prior decision to resign or the Secretary's determination as to the character of his discharge.

II. Appellant received an appropriate medical examination before separation

Appellant asserts that he was denied a psychiatric examination as part of his separation physical.

Paragraph 14(a)(11) of AFR 35-66, of July 23, 1956, provided for:

Standard medical examination, recorded on Standard Form 88, 'Report of Medical Examination,' to include psychiatric consultation, *if feasible*. [Emphasis added.]⁷

Appellant received the standard medical examination before his separation. (J.A. 21-22) He had no absolute right to a psychiatric consultation. The words "if feasible" import a discretion in the examining authorities to determine the advisability of such an examination. According to Webster's New International Dictionary (2d edition), "feasible" has these meanings:

1. Capable of being done, executed, or effected; possible of realization * * *
2. Capable of being managed, utilized or dealt with successfully; *suitable* * * *
3. Likely; probable; *reasonable*. [Emphasis added.]

In appellant's examination report, the examining physician made a clinical evaluation of "normal" with respect to the psychiatric category. (J.A. 21) The examining physician was not required in such circumstances to refer appellant for further psychiatric consultation. If it was his judgment that such a consultation was not appropriate, that judgment was within his sound discretion.⁸

Moreover, appellant seems to contend that a psychiatric consultation might have enabled him to explain how he had been victimized by unfortunate circumstances. This contention might carry greater weight had appellant chosen to resist discharge before the board of officers. Then such a consultation might have been of assistance to the board in performing its fact-finding and recommending function. But appellant chose

⁷ The provision of the revised AFR 35-66, effective April 14, 1959, was similar.

⁸ The District Court apparently believed that paragraph 14(a)(11) was wholly inapplicable to appellant's case, relying on the qualifying language at the beginning of paragraph 14. But paragraph 13(b)(1) does appear to make paragraph 14(a)(11) applicable in such cases.

the alternative course of tendering his resignation, to avoid the elimination process under AFR 35-66. It is difficult to see how such a consultation could have been relevant to the disposition of his tender of resignation. Thus any error in failing to give the consultation was not harmful under the circumstances. Here again, appellant now seeks to undo the consequences of his earlier voluntary decision to resign by an objection that is of no force when viewed in the context of that decision at the time it was made. Only in retrospect, in the light of his present desire to show the lack of foundation for the charges against him, could the omission of the consultation seem significant.*

Appellant's argument that he should have been retired for physical disability is subject to a similar defect. He did not apply for disability retirement under applicable Air Force regulations but elected to resign for the good of the service. Nor was any claim made that he was physically unable to perform the duties of his office and required hospitalization. This course cannot now be substituted for the one he chose to follow.

III. Appellant's claim is barred by laches

Although the court below did not find it necessary to pass on appellee's defense of laches, that principle, too, upholds the court's decision and requires affirmance of the judgment.

The law is well-settled that the defense of laches may be raised by a motion to dismiss or by a motion for summary

but was it?
*In the court below appellant also complained that he was denied an electrocardiogram contrary to law. The applicable regulation, paragraph 44b of AFM 160-1, provided:

"44. *Electrocardiogram:*

"b. Electrocardiogram will be done on the following:

- "(1) Forty years of age or over.
- "(2) Unsatisfactory response to exercise.
- "(3) History of cardiac symptoms, such as substernal pain or dyspnea.
- "(4) Sitting pulse under 50.
- "(5) Any finding suggestive of cardiac abnormality."

At the time of his separation examination, appellant had not passed his fortieth birthday. Examination did not disclose any of the other factors necessitating an electrocardiogram. Furthermore, an examination by a private physician made shortly after appellant's separation from the service showed no cardiac abnormality. (J.A. 36-37.)

judgment. *Haas v. Overholser*, 96 U.S. App. D.C. 22, 223 F. 2d 314 (1955); *Love v. Stevens*, 93 U.S. App. D.C. 69, 207 F. 2d 32 (1953); *Russell v. Thomas*, 129 F. Supp. 605 (S.D. Calif. 1955).

The requisite elements of laches are (1) unreasonable delay in prosecuting the claim; (2) resulting prejudice. In the present case appellant's request for correction of his military record was denied by the Air Force on May 5, 1960. Appellant did not file his complaint in the District Court until May 22, 1961, over a year later.

The Supreme Court has emphasized the importance of prompt action by an official claiming to have been illegally dismissed, in order to avoid prejudice to the Government service. In *United States ex rel. Arant v. Lane*, 249 U.S. 367, 372 (1919), the Court said:

When a public official is unlawfully removed from office, whether from disregard of the law by his superior or from mistake as to the facts of his case, obvious considerations of public policy make it of first importance that he should promptly take the action requisite to effectively assert his rights, to the end that if his contention be justified the Government service may be disturbed as little as possible and that two salaries shall not be paid for a single service.

* * * * *

Such a long delay [about 20 months in *Arant*] must necessarily result in changes in the branch of the service to which he was attached and in such an accumulation of unearned salary that, when unexplained, the manifest inequity which would result from reinstating him renders the application of the doctrine of laches to his case peculiarly appropriate in the interests of justice and sound public policy.

See also *Norris v. United States*, 257 U.S. 77 (1921); *Grasse v. Snyder*, 89 U.S. App. D.C. 352, 192 F. 2d 35 (1951); *Caswell v. Morgenthau*, 69 U.S. App. D.C. 15, 93 F. 2d 296 (1933), cert. denied, 305 U.S. 596.

In the present case appellant's delay in seeking judicial remedy was substantial. The prejudice to the Government is plain, since he seeks reinstatement to his position and the restoration of all benefits accruing from the date of discharge. Thus, if appellant prevails on the merits, the Government might be held liable for appellant's salary while someone else performed his duties. Failure to pursue his judicial remedy with reasonable promptness makes the grant of any judicial remedy inequitable.

CONCLUSION

Wherefore, it is submitted that the judgment of the District Court should be affirmed.

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NATHAN J. PAULSON,
DANIEL A. REZNECK,
Assistant United States Attorneys.

REPLY BRIEF FOR MURRAY H. INGALLS, APPELLANT

In The
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

No. 16,738

MURRAY H. INGALLS,

Appellant,

v.

EUGENE M. ZUCKERT,
Secretary of the Air Force,

Appellee.

Appeal from the United States District Court
for the District of Columbia

United States Court of Appeals
for the District of Columbia Circuit

Donald H. Dalton,
1028 Connecticut Avenue, N. W.
Washington, 6, D. C.

Attorney for Appellant

FILED APR 30 1962

Joseph W. Stewart
CLERK

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In The
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

No. 16,788

MURRAY H. INGALLS,

Appellant,

v.

EUGENE M. ZUCKERT,
Secretary of the Air Force,

Appellee.

Appeal from the United States District Court
for the District of Columbia

REPLY BRIEF FOR MURRAY H. INGALLS, APPELLANT

In his answer brief the Secretary is silent as to the retro-active action of a change in policy. As Judge Medina stated in N.L.R.B. v. National Container Corp., 211 F 2d. 525, 534:

"It is well settled that where, as here, an administrative agency in pursuance of its adjudicatory function makes an ad hoc change in one of its administrative policies, such change may be applied retroactively in an appropriate case."

Certainly this is a very appropriate case, where appellant flew over forty air combat missions in North Africa, Sicily, Salerno, Anzio and Southern France during World War II, besides being the recipient of numerous medals in the European-Africa-Middle East campaign, and other theatres of war.

Laches

The Court below did not pass on the question of laches in its summary judgment ruling. Therefore, laches is not before the Court. Nevertheless, the appellee's argument is answered as follows:

1. The Appellee's Motion For Summary Judgment Below Has Not Raised the Defense of Laches.

The Supreme Court has stated that a time delay alone does not constitute laches. In Gallihier v. Cadwell, 145 U.S. 368, 373 12 S.Ct. 873, 36 L. Ed. 738, 740, Mr. Justice Brewer, speaking for the Court stated:

"That laches is not, like limitation, a mere matter of time; but principally a question of the inequity of permitting the claim to be enforced, an inequity founded upon some change in the condition or relation of the property of the parties."

See also Mount Vernon Savings Bank v. Wardman, 84 U.S. App. D. C. 343, 173 F 2d. 648; Hoehn v. Crews, 144 F. 2d. 655, 671, cert. den., 323 U. S. 773 65 S.Ct. 135, 89 L. Ed. 618, reh. den. 323 U. S. 817, 65 S. Ct. 312, 89 L. Ed. 649, Affm'd., 324 U.S. 200, 65 S.Ct. 600, 89 L. Ed. 870.

2. Time Lapse of One Year and Seventeen Days Alone Does Not Constitute Laches.

To support the defense of laches, there must be a showing of

prejudice to one of the parties and unreasonable delay. The rule in the Galliher case, supra, and in Sis v. Boarman, 11 App. D. C. 116, 123; and as affirmed by the Supreme Court in Holmberg v. Armbrrecht, 327 U.S. 392, 396, 66 S.Ct. 582, 90 L. Ed. 743, establishes that the main ingredient of laches is prejudice. It is clear that a time lapse of one year and seventeen days, per se, does not constitute laches.

3. The Defense of Laches May Not Be Raised By a Motion to Dismiss. Treated As a Motion For Summary Judgment.

The Federal Rules of Civil Procedure require that the defense of laches be raised affirmatively:

Rule 8(c) provides in part:

"8... (c) Affirmative Defenses. In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction ... laches ... and any other matter constituting an avoidance or affirmative defense."

Also Rule 12(b) provides:

"Every defense, in law or fact, to a claim for relief in any pleading ... shall be asserted in the responsive pleading thereto if one is required"

The rules are quite clear that the defense of laches must be asserted in the answer and not raised by a motion to dismiss: Riley v. Titus, 89 U. S. App. D. C. 79, 190 F.2d. 653, 656, cert. den., 342 U. S. 855, 72 S. Ct. 82, 96 L. Ed. 644, reh. den. 72 S.Ct. 179, 342 U. S. 889, 96 L. Ed. 667; Callaway v. Hamilton Nat. Bk. of Wash. 90 U. S. App. D. C. 228, 195 F. 2d. 556, 562.

Inasmuch as laches is an equitable defense, it is necessary to weigh all the relevant facts before applying the rule. Hammond v. Hopkins, 143 U. S. 224, 250, 12 S. Ct. 418, 36 L. Ed. 134; Pfister

v. Cow Gulch Oil Co. 189 F 2d. 311, cert. den., 342 U. S. 887, 72 S. Ct. 177, 96 L. Ed. 665.

The defense of laches is not within the specifically excepted group. It therefore may not be raised prior to pleading, including the motion for summary judgment. As the complaint on its face does not make an apparent showing laches, the cause cannot be dismissed on the ground of laches.

4. A Summary Judgment Could Not Lie On The Facts Presented, Even If The Defense Of Laches Was Raised Properly.

Inasmuch as laches turns on the factual questions raised by the parties, appellee has tendered no proof with respect to the facts. There has been no showing of prejudice to the appellee; there has been no showing that another officer was appointed in the place of Major Ingalls.

Summary judgment lies when the pleadings, affidavits, depositions, if any, show, "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." FRCP 56(c), USCA, Title 28, sec. C., Dewey v. Clark, 86 U. S. App. D. C. 137, 180 F 2d. 776.

CONCLUSION

That the case should be reversed and remanded with directions that appellant be restored to his rank as major or be granted an honorable discharge and back pay.

Respectfully submitted,

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